THE SUPREME COURT OF THE UNITED STATES

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THIS MONTH

THE U. S. SUPREME COURT AND THE INFERIOR FEDERAL COURTS

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PROPOSALS TO "CURB POWERS" OF SUPREME COURT

DISCUSSED PRO AND CON

By

MEMBERS OF CONGRESS, GOVERNORS, LAWYERS, CITIZENS

ADDITIONAL FEATURES

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THE
CONGRESSIONAL
DIGEST

Vol. II JUNE, 1923 No. 9

The Supreme Court of the United States

Powers Vested in the Supreme Court by the Constitution

THE Judicial Branch of the Federal Government is provided for by the Constitution of the United States as follows:

Article III

THE JUDGES, THEIR TERMS, AND COMPENSATION

Section 1. The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

EXTENT OF THE JUDICIAL POWER

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

ORIGINAL AND APPELLATE JURISDICTION OF THE SUPREME COURT

In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

PLACES OF TRIAL OF CRIMES BY JURY

The Trial of all Crimes, except in Cases of Impeachment shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.

Section 3. Treason against the United States, shall consist only in levying War against them, or in adhering to their Enemies, giving them Aid and Comfort. No Person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court.

The Congress shall have Power to declare the Punishment of Treason, but no Attainder of Treason shall work Corruption of Blood, or Forfeiture except during the Life of the Person Attainted.

Article VI—Paragraph 2

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment XI

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Supreme Court and the Inferior Federal Courts

Extracts from "The Supreme Court of the United States," by W. W. Willoughby

THE first Congress, in pursuance of the legislative power given to constitute a federal judiciary, passed in 1789, what has been known as the Judiciary Act; a piece of legislation, in its perfect adaptation to the political needs, and in its accuracy of expression, second to none in our long list of congressional enactments. The act was drafted by a committee composed of Patterson, Johnson and Ellsworth, but was the work almost entirely of Ellsworth.

The first section of the Judiciary Act reads: "That the Supreme Court of the United States shall consist of one Chief Justice and five Associate Justices." The act further proceeds to establish the inferior courts and to define their fields of jurisdiction as follows: Three grades of federal courts were provided for. The United States was first divided into judicial districts, and to each of these districts was given a district court and a judge, appointed by the

President. These courts formed the lowest grade of courts. As provided for in the Act, each State was made a district, as were the Territories of Maine and Kentucky. At present, owing to increased density of population, many of the States are divided into two, and some into three and even four districts.

By the grouping together of these districts, circuits were formed, and to each of these a circuit court was given. These formed the grade of courts next higher than the district courts. The number of circuits has differed at different times. By the act of 1789 three were provided for; since 1869 there have been nine. Until 1869 (excepting a short period in 1801) there were no circuit judges, circuit work being done by the supreme court justices. By the act of 1869 a circuit judge was to be appointed by the President for each circuit. One of the justices of the Supreme Court is, however, still allotted to each of the circuits, and may sit in that circuit court if he desires. [By the Evarts act of 1891 Congress established nine circuit courts of appeals with nine circuit judges. Under this act the circuit work of the Supreme Court justices which formerly was obligatory became permissive, and in the past fifteen years the practice has been abandoned.] The circuit court may be held by the circuit judge, by the Supreme Court justice or by the district judge of that district in which the court is sitting; or by any two of them, or by all three of them sitting together.

Last, and highest of the federal courts, is the Supreme Court at Washington, at present consisting of a Chief Justice and eight Associate Justices.

The jurisdictional relations between the different grades of the federal courts is simple. Their jurisdiction is over federal questions, that is over those cases mentioned in the constitution and covered by Acts of Congress in pursuance thereof, to which the judicial power of the United States has been extended. To the circuit courts of appeals come all appeals from the district courts, which is allowed in all cases involving sums of five hundred dollars and over. The Supreme Court is the court of last resort, and to it come appeals from the circuit courts of appeals in cases involving five thousand dollars and over.

In addition to making these regulations concerning appeals from a lower to a higher federal court, the judiciary act gives to the Supreme Court the revision of certain classes of cases decided in the highest state courts. The twenty-fifth section of the act provides that this may be done in the following three classes of cases:

"First, where is drawn in question the validity of a treaty, or statute of, or an authority exercised under the United States, and the decision is against their validity. Second, where is drawn in question the validity of a statute of, or an authority exercised under the laws of a State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity. Third, where any right, privilege, or immunity is claimed under the Constitution, or any treaty, or statute of, or commission held, or authority exercised under the United States, and the decision is against the title, right, privilege, or immunity specially set up, or claimed by either party under such constitution, statute, commission or authority." No minimum amount to be involved in order to admit of an appeal to the Supreme Court was imposed in these classes of cases, for it was seen that in a case involving but a slight pecuniary amount, a federal question might be involved, the settlement of which would be of great importance to the whole people.

The cases decided by the Supreme Court are of two classes. First, those of original jurisdiction, as specified in the constitution; and second, those of appellate jurisdiction. Of this latter class there are two kinds, those coming to the Supreme Courts by way of appeal from the lower federal courts, and those coming thither by way of appeal from the highest state courts.

Besides the courts which have been mentioned there are a few other federal courts. The District of Columbia being under the direct control of the United States, its courts are federal tribunals, and cases in them admit of an appeal or writs of error or certiorari to the Supreme Court. The same is true of territorial courts established by federal authority.

Though a sovereign nation, and therefore not liable to suit, the United States permits parties having claims against it, to sue for the amount, and for this purpose has established at Washington a Court of Claims, held by five judges. From this court appeals lie, in some cases to the Supreme Court, and in other cases they are referred to Congress for final adjudication.

The Relation of the Judicial Branch to the Legislative Branch and to the Executive Branch

The Supreme Court and the Congress

Extracts from "The Supreme Court of the United States," by W. W. Willoughby

THE question whether, in the establishment of our Supreme Court in 1787 we see the establishment of an original judiciary with unique powers, turns, as on a pivotal point, upon the originality of the method of restraining legislative action by a separate judicial tribunal.

A study of European governments of that time shows that in this particular the convention followed no European example. In Europe, now, as then, there cannot be found a legislature that is not the judge of its own powers. There the highest courts have, in most cases, developed or rather differentiated out of the legislative body, and have remained to a considerable extent parts of their parents.

If, then, we are to find courts possessing prior to 1787, this power of which we are speaking, it is to America we must look. Decided evidences of the exercise of this power by colonial courts prior to the assembling of the constitutional convention may be found, and though we cannot, therefore, claim for the framers of our constitution the honor of entire originality in this case, we can claim it for the American people.

As early as 1780 Chief Justice Brearley, of the Supreme Court of New Jersey, is cited as giving it as the opinion of himself and his associates, that the judiciary had the right to pronounce upon the constitutionality of laws. In Virginia, in 1776 an act was passed taking from the governor the power of pardoning, and conferring it on the legislature. In 1782 a case under this law was carried to the courts, and it was there argued that the act of the Assembly was contrary to the intention of the Constitution and therefore void.

In 1787 the courts of North Carolina declared an act of the legislature void as unconstitutional.

Bancroft, in his History of the Constitution, quotes a letter from J. B. Cutting to Jefferson, dated in 1788, which states that the Supreme Court of Massachusetts had, some years before, declared a legislative act unconstitutional.

The case of *Trevitt* v. *Weeden,* decided in Rhode Island in 1786, is cited by both Judge Cooley and Professor McMaster as deciding a law unconstitutional.

In the light of these cases, which have been cited, I think it can be maintained that the idea of control of the legislature by judicial authority had been developed before the assembling of the convention of 1787. It had been specifically asserted in at least as many as five colonies, and had been the subject of considerable popular discussion. When the American republics solved for the world the problem of federal union, the supreme judiciary, which they erected, was taken from their own state governments, powers being given it commensurate with its new and enlarged duties. Everywhere but in America its powers were unique.

In forming a scheme for central government, our fathers were restrained, not only by the fear lest a national government should be established so strong as to threaten the autonomy of the States, but were fearful lest, like Frankenstein, they should create a being which, when life were once breathed into it, would be beyond their control, and which, though originally with proper powers, would in time, by its own strength, draw to itself increasing powers and become a tyrant. To avert this evil, the members of the convention made the three branches of government co-ordinate in power.

The most powerful of these checks in retaining, not only the proper relations between the state and federal power, but between the departments of the federal govrenment, has undoubtedly been the Supreme Court. It has been the balance wheel of the republic. The Constitution as supreme over all these powers, has set to them a limit—the Supreme Court, as interpreter of the Constitution, has been the instrument for rendering operative these limitations.

To render the Supreme Court capable of performing this high function expected of it, it was necessary to endow it with two attributes; first, independence of the legislature; and second, power to hold, in suits between parties, legislative acts unconstitutional, and therefore void. The granting of this power was not left to the mere caprice of its creators, but was forced upon them by the very nature of our government. The establishment of a sovereign legislature is inconsistent with the very aim of federalism, namely, the maintenance of a division of powers between the national and state governments. To have made Congress the authorized interpreter of its own acts, would evidently have left unobstructed the road to rapid absorption of state duties in national governmental activity.

In the United States there are four grades of law. First, and highest, the Federal Constitution, next in power the federal laws, statutes and treaties, next lower the state constitutions, and lowest the bodies of state law. In case of claimed conflict between the first and second, or between the first or second and the two lower grades of law, the only question to be decided by the Supreme Court is as to the existence of that conflict. If, from its interpretation of the law, the Supreme Court decides such conflict to exist its work is done. The higher law governs the lower. There is no contest, no struggle between the grades of law. It has already been settled which grade of law is the higher, and therefore to govern. There is no dispute between the court and the legislature. "It is natural to say," says Dicey, "that the Supreme Court pronounces acts of Congress invalid, but in fact this is not so. The court never pronounces any opinion whatever, upon an act of Congress. What the court does is simply to determine that in a given case, A is, or is not, entitled to recover judgment against X; but in determining that case, the court may decide that an act of Congress is not to be taken into account, since it is an act beyond the constitutional power of Congress."

Every act of the legislature is presumably valid. Its constitutionality can be tested only when brought before the court in a specific case. The court never goes to meet a law, nor anticipates its execution by an opinion as to its constitutionality.

If an act is held void it is because it is contrary to the constitution, and not because the court claims any control over the legislature.

The Supreme Court and the Executive

Extracts from "The Supreme Court of the United States," by W. W. Willoughby

THE main point upon which the maintenance of the proposition of the independence of the powers of our federal government rests, is in reference to the freedom of action of the executive.

Has the President the right to veto an act of Congress because he believes it to be an unconstitutional measure? He has. The only objection that has been raised to this affirmative answer is that in thus acting the President is arrogating to himself judicial functions; that it is the duty of the judiciary alone to pass upon the constitutionality of laws. The objection is not well made, however. In placing a veto upon a congressional enactment, the President is exercising, not a judicial, but a legislative function. His veto is of the nature of a powerful vote, and his decision as to the way his vote is to be cast must be formed from his own views and opinions. The constitution gives him the power and he has a right to use it; indeed, it is his duty so to use it.

In 1832 Jackson vetoed the bill providing for a recharter of the National Bank. This he did mainly on the ground of unconstitutionality, notwithstanding the fact that in the case of *McCulloch* v. *Maryland* this institution had been carefully examined by the Supreme Court and pronounced constitutional. In support of his action, Jackson, in his veto message said: "The Congress, the Executive, and the Court, must each for itself be guided by its own opinion of the Constitution. Each public officer who takes an oath to support the Constitution, swears that he will support it as he understands it, and not as it is understood by others. It is as much the duty of the House of Representatives, of the Senate, and of the President, to decide upon the constitutionality of any bill or resolution which may be presented to them for passage or approval, as it is of the Supreme Court when it may be brought before them for a judicial decision. The opinion of the judges has no more authority over Congress than the opinion of Congress has over the judges, and on that point the President is independent of both."

Has the President the right to refuse to execute a law, passed during the term of a predecessor, or over his veto, because he deems it unconstitutional? Here we come to an entirely different question. In this case we are considering the attitude of the President, not towards a measure in process of enactment, as is the case when the veto is exercised, but towards a bill that has passed through all the constitutional forms of enactment, and become a law. The question we have propounded in this instance is not an easy one to answer, and contradictory opinions are held regarding it. A careful consideration of all the theoretical and practical points involved, leads me to the opinion that the executive has not this

power of defeating the will of the people or of the legislature as embodied in law.

But is the President to execute patently unconstitutional laws, if passed by the legislature? Yes. As has been said, his discretion lies in the exercise of his veto power. If this is of no avail, then he has no further discretion but must obey. If the laws are patently unconstitutional, they will be soon contested by private individuals, and a decision obtained at the hands of the Supreme Court. After decision upon them by this high court the case will be changed. This leads us to the next question.

Has the President, or have any of the officers of the government, the right to refuse obedience to a judgment of the Supreme Court, because they believe such judgment to be based upon an incorrect interpretation of the Constitution? Here we have the case of an enactment having necessarily not only the favoring view of the Congress, but the sanction and support of the highest judicial tribunal of the land. I can see no shadow of constitutional right on the part of a public official to refuse to execute a judgment of a federal court. This case is stronger than the former one by the additional support of the judiciary. To refuse now to execute the command of the court is to assume the judicial power of a court of appeals as well as legislative functions. Says Judge Cooley on this point: "It may become his duty as executive to assist in enforcing a judgment he believes erroneous, should enforcement by the ordinary process of the court, and by its own officers become impossible. Nevertheless it is conceivable that the executive may refuse to obey either a statute or the judgment of a court. . . . It can be said of such cases only this, that the responsibility of the President for a refusal to regard the judicial mandate, is on the one hand to the people, and on the other to the process of impeachment."

James Madison in a letter written in 1834 gives a view of the position and influence of the Supreme Court so far as the question we are now discussing is concerned.

"It is the judicial department in which questions of constitutionality, as well as of legality, generally find their ultimate discussion; and the public deference to and confidence in the judgment of the body are peculiarly inspired by the qualities implied in its members; by the gravity and deliberation of their proceedings; and by the advantage their plurality gives them over the unity of the executive, and their fewness over the multitudinous composition of the legislative department. Without losing sight, therefore, of the coordinate relation of the three departments to each other, it may always be expected that the judicial bench, when happily filled, will, for the reasons suggested, most engage the respect and reliance of the public as the surest expositor of the Constitution, as well in questions within its cognizance concerning the boundaries between the several departments of the government as in those between the Union and its members."

In what class of cases may the judiciary interfere to command the performance of a duty on the part of an unwilling executive official?

The federal judiciary has never attempted to arrogate to itself the exercise of ministerial functions. From the date of the creation of the federal judiciary this has been the rule. In Hayburn's case, which came before a circuit court in 1791, an act of Congress was pronounced unconstitutional, which had assigned ministerial functions to the circuit courts; and Congress repealed the law.

Also the Supreme Court has never attempted to lay down rules prescribing the manner in which any of the executive officials shall perform their duties. The court must wait until a particular action of an official has given rise to a cause giving it jurisdiction. It cannot, in the anticipation of the future execution of a law endeavor by an opinion, or a writ, to enforce its execution in a particular manner, or to prohibit entirely the performance of such action. "Neither the executive nor the legislature can be restrained in its action by the judiciary, though the actions of both when performed are in proper cases subject to its cognizance."

It is only in certain cases that the court will consent to review the actions of one of the other departments; namely, in those of a strictly non-political character.

In regard to the power of the judiciary to restrain the executive from any duty specifically given by the Constitution or by constitutional enactment, the Attorney-General advised the President in 1828 as follows: "I am of the opinion that it is not in the power of the judicial branch of our government to enjoin the executive from any duty specially devolved on it by the legislative branch of the government, or by the constitution of the United States. If it were otherwise it would be in the power of the judicial branch of the government to arrest the whole action of the other two branches. My opinion is that the judiciary can no more arrest the executive in the execution of a constitutional law than they can arrest the legislature itself in passing a law."

The powers of the President are almost entirely of a political nature and consequently can rarely be brought within the scope of a judicial examination. His only responsibility is to the people; his only check liability to impeachment.

The Relation Between the Federal Judiciary and the States

Extracts from "The Supreme Court of the United States," by W. W. Willoughby

BY the new Constitution framed in 1789, the general government, in its proper field, was made supreme; but the supremacy thus conferred could be peacefully maintained, only by clothing the federal government with judicial and executive power, adequate to interpret and carry into execution its commands. The federal law had to receive an interpretation uniform and free from local prejudices.

For these reasons a Supreme Court was provided, Congress given the power to establish other inferior courts, and the judicial power of the United States made to extend "to all cases in law and equity arising under this constitution, the laws of the United States, and treaties made, or which shall be made under its authority." Not only this, but jurisdiction was given over all cases in which a State, as a State, was in any way interested, or in which citizens of different States were contesting. Added to this was the second clause of Article VI which provided that the laws of the United States should be the supreme law of the land; and judges in every State to be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The double purpose to be subserved by the erection of a federal judiciary was to be, the preservation of the States in their rights of government, as well as the protection of the general government against legislative encroachments on the part of the state legislatures.

It is very interesting to place side by side the views held by the different Chief Justices concerning the nature of our Constitution. Marshall took the simple Federalist view, that the Constitution was formed and adopted by the "people" solely, and hence derives its authority from them; that the assent of the state government was not required, nor

asked, nor given, except impliedly. Chase went back of this, and upon historical grounds, placed the origin of our nationality before the adoption of the Constitution. That our national life began with the first attempts of the colonies to engage in united action. In Taney's decisions we find the States described as originally sovereign and independent, and the Constitution as primarily the work of their hands, by which they surrendered a part of their sovereignty.

After the ratification of the Constitution had been assured, the opponents of its adoption shifted their ground, and turned their attention to the restriction into as narrow compass as possible the activity of the National Government, and during the first few years of our federal existence, the national judiciary was subjected to repeated and deliberate assaults by the state legislatures.

The twenty-fifth clause of the judiciary act of 1789 provided that in three classes of cases an appeal might lie from the highest courts of the States to the Supreme Court; and that the constitutional grounds for the grant of this power to the federal judiciary rested upon implication and not direct donation. The constitutionality of this section did not remain unchallenged by the States, jealous of the independence of their powers.

In *Gibbons* v. *Ogden*, it was decided that the State of New York, had, though probably unintentionally, entered a field of jurisdiction already exclusively entered by the federal government; namely, the regulation of inter-state commerce. The decision of this case involved a construction of that clause of the constitution which gives to Congress the power "to regulate commerce with foreign nations and among the several States, and with the Indian tribes." It was herein determined that "the power to regulate commerce includes the power to regulate navigation, and does not stop at the external boundaries of a State." "Moreover, the power of Congress to regulate commerce, either with foreign nations or among the States, does not stop at the jurisdictional lines of the State, but must necessarily be exercised within their territorial jurisdiction, and must include every case of commercial intercourse which is not a part of the purely internal commerce of a single State."

The attitude of the Supreme Court towards the States in construction of the XIIIth and XIVth Amendments is worthy of note. In the proper application of the additional restrictions placed upon the States by these additions to the Constitution, the services of the Supreme Court as a check, now not to undue State action, but as a protection to the States against too great federal interefence, were conspicuous. As, in the early years of our constitutional history, the Supreme Court had been a potent factor in protecting the then weak Union against the more powerful and aggressive States, so now it saved the victorious Unionists from being hurried in their excitement and passion to a too great movement in the opposite direction, towards centralization. As a conservative element in our constitutional development, the court showed itself as useful as a constructive power.

In exercising their jurisdiction, the federal courts are frequently called upon, by the character of the parties involved, to adjudicate upon the same subject and legal points that the state courts have decided in cases of their own. In such cases the federal courts follow the statute law of the State and the former decisions of the state courts. This subject is discussed at considerable length by D. H. Chamberlain in Constitutional History of U. S., who says: "The rule to be drawn from the cases now examined as well as from numerous other cases which have arisen in the Supreme Court of the United States, seems to be well settled and defined, and may be thus stated: (1) The statutes of a State and the construction put upon them by the highest court of a State are binding and conclusive upon the courts of the United States in all cases where such statutes so construed are not in conflict with the Constitution of the United States, and where such decisions can be regarded as the settled, fixed, and received law of the State; (2) but that whenever, in the judgment of the United States courts, state statues as construed by state courts are in conflict with the Constitution of the United States, or (3) whenever the decisions of the state courts are conflicting, so that any specified decision or decisions of the state courts cannot fairly be regarded as expressing the settled law of the State, the United States courts are not bound by such statutes or decisions. This rule with these limitations seems to be well settled, and to have been adhered to with somewhat unusual consistency by the Supreme Court of the United States." It might be added also that no state law can be adjudged void for being in violation of the Constitution of that State. The determination of that point belongs to the courts of the State itself.

The theory of our judiciaries is in exact harmony with the theory of our whole federal union. The State is essential to the Union, and the Union is essential to the existence of the States. Each supplements and assists the other. Within their own bounds each is all powerful. It is just as much so with the judiciary, as it is with the other branches of the government. The field of activity is divided between state and federal courts upon broad and intelligible principles, and each recognizes its own limitations. Excepting the first few years of our federal existence, when the federal machinery had not yet become well fixed and smooth running, there have been surprisingly few serious conflicts between the two systems of courts.

The Supreme Court and International Relations

THE relations of the Supreme Court to international affairs arise not alone in its duty of interpreting treaties which are declared to be a part of the supreme law of the land by Art. VI of the Constitution, but also to cases in which foreign states, citizens or subjects are a party, admiralty and maritime cases, and under such laws as Congress may pass "to define and punish piracies and felonies upon the high seas and offenses against the Law of Nations."—*Editor's Note.*

POLITICAL OR LEGISLATIVE INTERNATIONAL QUESTIONS

Upon political questions the courts are bound to follow the decision of the political departments of the Government; that is, the question as to the existence of peace or war; as to the existence of tribal relations; as to the public character of a person claiming to be a foreign minister; as to the existence of a treaty; as to whether a foreign power has become an independent State; as to boundaries between the United States and another nation; as to the admission or exclusion of aliens.

FOREIGN RELATIONS AND TREATIES

It is the exclusive right of governments to recognize new States arising in the revolutions of the world, and until such recognition, either by this Government or the Government to which the new State belonged, courts must consider the former situation as remaining.

DUTY OF JUDICIARY TO CONSTRUE STATUTES

The Constitution imposes upon the judicial department

the solemn duty of interpreting the laws of which treaties are a part; and however disagreeable that duty may be, in cases where its own judgment shall differ from that of other high functionaries it is not at liberty to surrender or to waive it.

JURISDICTION OVER QUESTIONS ARISING UNDER TREATIES

The jurisdiction of the Federal courts is exclusive over questions arising under treaties, where such questions are not political. As between the legislative and judiciary departments, however, so far as the provisions of a treaty can become the subject of judicial cognizance, they are subject to acts of Congress passed for their enforcement, modification, or repeal.

CONSTRUCTION OF TREATIES

The construction of treaties is the peculiar province of the judiciary and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty or to affect titles already granted by the treaty itself.

"The effect of treaties and acts of Congress, when in conflict, is not settled by the Constitution. But the question is not involved in any doubt. A treaty may supersede a prior act of Congress and an act of Congress may supersede a prior treaty." (The Cherokee Tobacco case, 11 Wallace, p. 621.)

"If the act of Congress, because it is the late law, must (has) prescribed the rule by which this case is determined, we do not inquire whether it preceeds upon a just interpretation of the treaty or an accurate knowledge of the facts * * * or whether it was an accidental or purposed departure from the treaty. It is sufficient that the law was so written." (Taylor *v.* Morton, 2 Curtis, p. 454.)

"When the terms of the (treaty) stipulation impart a contract—when either of the parties engages to perform a particular act—the treaty addresses itself to the political, and not the judicial department; and the legislature must execute the contract before it can become a rule of court." (Foster *v.* Neilson, 2 Peters, p. 314.)

On public rights, the courts follow the political department of the government, both as to the interpretation of a treaty and as to whether the alleged treaty is actually in force. When, on the other hand, treaties confer private rights on citizens or subjects of the contracting parties—rights such as are enforcible in a court of justice—the courts accept such treaties as rules of decision and place upon them their own interpretation.

In cases where private rights are involved a prior executive interpretation of a treaty would not be considered necessarily binding upon the courts. On the other hand, when private rights have been determined by the Supreme Court through the interpretation of a treaty, the executive department of the government considers such interpretation conclusive as to the treaty's meaning. (Maiorano *v.* B. & O. R. R. Co., 213 U. S. Reports, p. 268.)

Although the question of the continuing obligation is a political one, the courts hold that private rights which have been established by treaty survive, even though the treaty is terminated by the action of the political departments of the government. (Carneal *v.* Banks, 10 Wheaton, p. 181.)

Where judicial action is necessary for its enforcement, the Supreme Court might virtually terminate a treaty as law of the land by declaring it unconstitutional. This, however, has never been done.

AMBASSADORS AND CONSULS, ETC.

The judicial power extends to all cases affecting ambassadors and consuls notwithstanding they are not parties to the record. The jurisdiction of circuit courts over a controversy between a citizen and an alien is not defeated because the alien is the consul of a foreign government, and citizens of the United States, although consuls of foreign nations may be sued in the district court where they are not received as diplomatic agents, though they be acting for the minister in his absence. The constitutional grant of original jurisdiction to the Supreme Court of cases affecting ambassadors and consuls is not exclusive, and subordinate Federal courts may be invested with jurisdiction in such cases.

ADMIRALTY AND MARITIME CASES

Jurisdiction is conferred on the Federal courts in admiralty because, as the seas are the joint property of the nations, the jurisdiction is essentially national and because of their nature such cases are closely connected with the grant of the commerce power. The jurisdiction is not restricted to admiralty, but includes all maritime jurisdiction. The constitutional provision for Federal jurisdiction refers to a system of law operating uniformly in the whole country, and regard must be had to our legal history, Constitution, legislation, customs, and adjudications. The admiralty jurisdiction was not intended to be as limited as it was in England at the time of the adoption of the Constitution, and it was to guard against a narrow construction of the word "admiralty" that "maritime" was added.

The courts of admiralty are not bound by the strict rules of the common law, but act upon enlarged principles of equity. The jurisdiction, while granted partly because of its close alliance to the commerce power, is nevertheless independent of that power. The whole subject belongs exclusively to the Federal Government. The exercise of the jurisdiction by the inferior Federal courts is dependent upon Congressional legislation, and Congress may limit or control it, or modify the practice. But the jurisdiction can not be enlarged by any law or rule of court. The term includes jurisdiction of all things done upon and relating to the sea and for damages for injuries on the high seas, the subject matter in cases of contract and the locality in cases of tort being the true tests of jurisdiction.

The admiralty jurisdiction can only be exercised under the laws of the United States, and rests on the grant in the Constitution and the terms in which that grant is extended to the respective courts of the United States.

CASES BETWEEN FOREIGNERS AND AGAINST FOREIGN VESSELS

The admiralty courts of this country may afford redress for a breach of a contract of affreightment, notwithstanding the ship is a foreign one, and the contract was made and was to be performed in foreign countries.

The courts of the United States have jurisdiction in admiralty when the litigants are of different foreign nationalities and the case having arisen on the high seas in one *communis juris*.

A public vessel of war of a foreign nation at peace with the United States, coming into our ports and demeaning herself in a friendly manner, is not amenable to process of our courts.

Admiralty has jurisdiction of an action between parties who are foreigners where the parties consent to the jurisdiction.

CASES AND CONTROVERSIES INVOLVING FOREIGN STATES, CITIZENS OR SUBJECTS

The Federal courts have jurisdiction where foreign States or individual foreigners are parties; but it does not authorize cognizance of suits between aliens, and a citizen

must be the adverse party. The jurisdiction extends to a suit between citizens of the same State where the plaintiff is merely nominal and suing for an alien. One who is an alien at the time a suit is commenced may sue in the Federal courts. The diversity of citizenship must, as in other cases, appear from the record, and although one party be described as an alien, the other must be expressly stated to be a citizen of a particular State. An averment that a plaintiff is "a citizen of London, England," is insufficient. At common law an alien can not maintain a real action, but the disability is purely personal. A court may have jurisdiction as to parties and subject matter, yet if it makes a decree which is not within the powers granted to it, such decree is void, and a circuit court may entertain a suit between two aliens to impeach a decree in a former suit in the same circuit. The Chinese exclusion acts do not deprive a Chinaman of the right to have the Federal courts determine his right to land. An Indian tribe is not a foreign nation within this clause. A foreign corporation is an alien for the purposes of suit in the Federal courts.

Under this provision the Federal court had jurisdiction of a suit between a West Virginia corporation and the Republic of Colombia, Colombia *v.* Cauca Co., 190 U. S. 524.

A foreign sovereign, as well as any other person who has a demand of a civil nature against a citizen of the United States, may maintain an action in our Federal courts therefor.

If these be the parties, it is entirely unimportant what may be the subject of controversy. Be it what it may, these parties have a constitutional right to come into the courts of the Union.

BETWEEN ALIENS

The judicial power was not extended by the Constitution to private suits in which an alien is a party unless a citizen be the adverse party.

SUPREME COURTS AND INTERNATIONAL LAW

The Supreme Court has recognized and taken cognizance of international law (whether described as such or as Law of Nations).

In the case of Paquette Habana, 175 U. S. Reports 677, 700, the Supreme Court declared "international law is part of our law, and must be ascertained and administered as often as questions of right depending upon it are duly presented for their determination. For this purpose, when there is no treaty, and no controlling executive or legislative act or judicial decision, resort must be had to the customs and usages of civilized nations."

QUESTIONS OF PROCEDURE

In dealing with such a *quasi* international controversy as a suit between States, there is no municipal code governing the matter, and the Supreme Court may be called on to adjust differences that can not be dealt with by Congress or disposed of by the legislature of either State alone. That court, therefore, will not consider objections on matters of procedure, abatement, and the like, except so far as they affect the merits.

THE above compilation consists of extracts from "Constitution of the United States as amended to Jan. 1, 1923 (annotated) with citations to cases of Supreme Court of the United States, construing its several provisions [compiled by George Gordon Payne, under the direction of Senator Charles Curtis, Chairman, Senate Committee on Rules], S. Doc. 96, 67th Cong., 2d Sess.," "The Conduct of American Foreign Relations" (1922) by John Mabry Mathews, and quotations from decisions of the Supreme Court of the United States.

The Supreme Court Today: Its Procedure and Work

The Rules of the Supreme Court of the United States provide as follows: "Rule 3—This court considers the former practice of the courts of the king's bench and of chancery, in England, as affording outlines for the practice of this court; and will, from time to time make such alterations therein as circumstances may render necessary."

Extracts from "The Supreme Court of the United States," by W. W. Willoughby

THE number of Justices of the Supreme Court has been changed several times. The Judiciary Act provided for a chief justice and five associate justices. At present there are nine justices, a chief justice and eight associate justices.

Until 1869, with the exception of a few months in 1801, the Supreme Court Justices had circuit duty to perform. By the act of that year, a judge for each circuit was provided for, and the Supreme Court Justices relieved from much of their circuit work. [By the Evarts Act of 1891 circuit work of the Supreme Court Justice was made permissive.] The Supreme Court Justices still may go upon circuit, but the practice has been practically abandoned. Another provision of the act of 1869, was one permitting a justice to retire with full pay, when seventy years of age, and after ten years of service.

The Chief Justice now receives a salary of $15,000 per annum, and his Associates $14,500 each.

The Supreme Court holds annual terms, beginning the first Monday of October, and lasting usually until the first or second Monday in the following June. Daily sessions, with the exception of Saturdays and Sundays, are held, beginning at 12 M. Recesses are announced and taken at different times during the term. The Court sits in the capitol building at Washington, in the room which was formerly the Senate Chamber. The opening of the Court is announced by the crier: "Oyez! Oyez! Oyez! All persons having business before the Honorable the Supreme Court of the United States are admonished to draw near and give their attention, for the court is now sitting. God save the United States and this Honorable Court!"

The Supreme Court works with exceedingly little friction. Quietness, solemnity, dignity, and rapidity, characterize its proceedings. The cost of carrying a case through the Supreme Court is comparatively slight. The court fees are very small; the main expenses are for counsel fees and printing the record.

Saturday morning the justices meet in consultation to decide cases. In hearing a case, six of the nine justices constitute a quorum, and decisions are governed by a majority vote. One justice from the majority in each case is selected to prepare a written opinion. Dissenting opinions are also frequently prepared and read. Decisions are usually announced on Mondays.

All decisions by the Supreme Court are, of course, final. No mode is provided by which any tribunal can reëxamine what the Supreme Court has decided. The case is not only settled, but the principles of the decision remain as precedents for the settlement of cases of similar nature, which may arise in the future. These precedents are sometimes, though very seldom, disregarded. Until the end of the sesssion, any case decided during that session is considered as being still "in the bosom of the Court,"

and upon sufficient cause being shown, a re-hearing is sometimes allowed. The Supreme Court cannot again hear a case decided by it during a previous session, though a new case, involving the same questions may be heard, and, despite precedent, obtain a contrary decision.

In cases at law brought by writ of error to the Supreme Court only the bill of exceptions is reviewed, and, if material errors in the ruling of the lower court are discovered, the case is remanded for a new trial; if no such errors are proven, the decision is affirmed. In appellate cases in equity, the whole record of the case is submitted, and the cause finally decided. When a State is summoned to respond to a complaint, a subpoena is issued on the Governor and Attorney-General of the State. The Attorney-General then appears and answers.

During the early years of the history of this Court, the amount of business transacted was very small. In 1801, at the accession of Chief Justice Marshall, there were only ten cases awaiting a hearing. The next five years the entire number of cases decided was 120. From 1820 to 1830 the aggregate number was 259, an average of 58 a year. From 1830 to 1850 there was a gradual increase. From 1845 to 1850 the average number of cases heard per year was 71. Since 1850 the increase has been rapid. From 1875 to 1880, 1,955 cases were heard and decided.

The causes that have given rise to the increase of the Court's business are numerous. First, there has been the growth of our territory, wealth, and population. Also, there is the wonderful growth of our railroads and telegraphs, most of them crossing State lines, which yearly give rise to a large number of cases. Then, also, there has been the large number of claim cases since the establishment of the Court of Claims. But in addition to these, Congress, since 1850, by numerous acts, especially by that of 1875, has not only greatly enlarged the jurisdiction of the lower federal courts, but has widened the class of cases that may be removed from state to national courts. All of these causes, together with other minor ones, have operated to increase the business of the Supreme Court, until now it is nearly overwhelmed with accumulated work, and this, notwithstanding the fact that our Supreme Court Justices are among the hardest worked of our public officials. During eight months, instead of three, as formerly, they are in practically continuous session.

The Work of the October Term, 1922

CASES ON DOCKET		CASES DISPOSED OF		CASES ON DOCKET UNDISPOSED OF	
Original	29	Original	5	Original	24
Appellate	1128	Appellate	760	Appellate	368
Total	1157	Total	765	Total	392

(NOTE: *Of the 765 cases disposed of 305 were petitions for certiorari.*)

Important Decisions of Public Interest Rendered by the Supreme Court During Late Term

October 2, 1922–June 11, 1923

Foreign Language Cases

Meyer vs. *Nebraska.* In Error to the Supreme Court of the State of Nebraska. Opinion of the Court delivered by Mr. Justice McReynolds, June 4, 1923.

The decision: Plaintiff in error was tried and convicted in the District Court for Hamilton County, Nebraska, under an information which charged that while an instructor in Zion Parochial School he unlawfully taught the subject of reading in the German language to a child of ten years, who had not attained and successfully passed the eighth grade. The information is based upon "An act relating to the teaching of foreign languages in the State of Nebraska," approved April 9, 1919.

The problem for our determination is whether the statute as construed and applied unreasonably infringes the liberty guaranteed to the plaintiff in error by the Fourteenth Amendment. "No State . . . shall deprive any person of life, liberty or property without due process of law."

While this court has not attempted to define with exactness the liberty thus guaranteed, the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men. The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the courts.

That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected. The protection of the Constitution extends to all, to those who speak other languages as well as to those born with English on the tongue. Perhaps it would be highly advantageous if all had ready understanding of our ordinary speech, but this cannot be coerced by methods which conflict with the Constitution—a desirable end cannot be promoted by prohibited means.

We are constrained to conclude that the statute as applied is arbitrary and without reasonable relation to any end within the competency of the State.—*Extracts.*

Mr. Justice Holmes delivered a dissenting opinion in the *Bartels* vs. *Iowa* foreign language case which was decided upon the authority of the previous case. Mr. Justice Sutherland joined in the dissent.

We all agree, I take it, that it is desirable that all the citizens of the United States should speak a common tongue, and therefore that the end aimed at by the statute is a lawful and proper one. The only question is whether the means adopted deprive teachers of the liberty secured to them by the Fourteenth Amendment. I think I appreciate the objection to the law but it appears to me to present a question upon which men reasonably might differ and therefore I am unable to say that the Constitution of the United States prevents the experiment being tried.—*Extracts.*

Kansas Court of Industrial Relations

Wolff Packing Co. v. *Court of Industrial Relations of the State of Kansas.* In error to the Supreme Court of Kansas. Opinion of the Court delivered by Mr. Chief Justice Taft, June 11, 1923.

The decision: We think the Industrial Court Act in so far as it permits the fixing of wages in plaintiff in error's packing house is in conflict with the Fourteenth Amendment and deprives it of its property and liberty of contract without due process of law. The judgment of the court below must be reversed.—*Extracts.*

Maternity Act Cases

No. 24 Original. *Commonwealth of Massachusetts* vs. *Andrew W. Mellon, Secretary of the Treasury et al.* No. 962. *Harriet A. Frothingham* vs. *Andrew W. Mellon, Secretary of the Treasury et al.* Appeal from the Court of Appeals of the District of Columbia. Opinion of the Court delivered by Mr. Justice Sutherland, June 4, 1923.

The decision: No. 24, Original, dismissed. No. 962 affirmed.

These cases were argued and will be considered and disposed of together.*

We have reached the conclusion that the cases must be disposed of for want of jurisdiction without considering the merits of the constitutional questions.

In the first case, the State of Massachusetts presents no justiciable controversy either in its own behalf or as the representative of its citizens. The appellant in the second suit has no such interest in the subject matter, nor is any such injury inflicted or threatened, as will enable her to sue.

First. The State of Massachusetts in its own behalf, in effect, complains that the act in question invades the local concerns of the State, and is a usurpation of power, viz: the power of local self government reserved to the States.

Under Article III, Section 2, of the Constitution, the judicial power of this court extends "to controversies . . . between a state and citizen of another state" and the court has original jurisdiction "in all cases . . . in which a state shall be a party." The effect of this is not to confer jurisdiction upon the court merely because a State is a party, but only where it is a party to a proceeding of judicial cognizance. Proceedings not of a justiciable character are outside the contemplation of the constitutional grant.

Looking through forms of words to the substance of their complaint, it is merely that officials of the executive department of the government are executing and will execute an act of Congress asserted to be unconstitutional; and this we are asked to prevent. To do so would be not to decide a judicial controversy, but to assume a position of authority over the governmental acts of another and co-equal department, an authority which plainly we do not possess.—*Extracts.*

Minimum Wage Law of the District of Columbia Case

Jesse C. Adkins et al. vs. *Willie A. Lyons.* Appeals from the Court of Appeals of the District of Columbia. Opinion of the Court delivered by Mr. Justice Sutherland, April 9, 1923.

The decision of the Supreme Court of the District of Columbia maintained the constitutionality of the law. (Act of September 19, 1918, 40 Stat. 960.) On appeal this was affirmed by the Court of Appeals of the District, but on rehearing this judgment was reversed and the law declared unconstitutional by a divided bench. The case was appealed to the Supreme Court of the United States.

Briefs were prepared by interested authorities in California, Kansas, New York, Oregon, Washington, and Wisconsin, as amici curiae.

Mr. Justice Sutherland delivered the majority opinion, declaring the law unconstitutional which was prefaced by a statement of the facts, following which certain governing principles were enounced, the most important being "the rule that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt"; adding, "but if by clear and indubitable demonstration a statute be opposed to the Constitution we have no choice but to say so." It was said that the statute is attacked because authorizing an interference with the freedom of contract which is guaranteed by the due process clause of the fifth amendment. "That the right to contract about one's affairs is a part of the liberty of the individual protected by this clause, is settled by the decisions of this court and is no longer open to question." Contracts for the employment of labor are included, and, "generally speaking, the parties have an equal right to obtain from each other the best terms they can as the result of private bargaining."

Four justices concurred with Mr. Justice Sutherland in the foregoing opinion, making a majority of the court. Mr. Justice Brandeis took no part in the consideration or decision of these cases. Dissenting opinions were prepared by Mr. Chief Justice Taft and Mr. Justice Holmes, in the former of which Mr. Justice Sanford concurred.

Mr. Chief Justice Taft, dissenting, said:

I regret much to differ from the court in these cases.

The boundary of the police power beyond which its exercise becomes an invasion of the guaranty of liberty under the fifth and fourteenth amendments to the Constitution is not easy to mark.

The right of the legislature under the fifth and fourteenth amendments to limit the hours of employment on the score of the health of the employee, it seems to me, has been firmly established.

If it be said that long hours of labor have a more direct effect upon the health of the employee than the low wage, there is very respectable authority from close observers, disclosed in the record and in the literature on the subject quoted at length in the briefs that they are equally harmful in this regard.

I do not feel, therefore, that either on the basis of reason, experience, or authority, the boundary of the police power should be drawn to include maximum hours and exclude a minimum wage.

I am not sure from a reading of the opinion whether the court thinks the authority of Muller *v.* Oregon is shaken by the adoption of the nineteenth amendment. The nineteenth amendment did not change the physical strength or limitations of women upon which the decision in Muller *v.* Oregon rests. The amendment did give women political power and makes more certain that legislative provisions for their protection will be in accord with their interests as they see them. But I don't think we are warranted in varying constitutional construction based on physical differences between men and women, because of the amendment.—*Extracts.*

*An account of these cases was printed in the March, 1923, CONGRESSIONAL DIGEST.

Minimum Wage Law of the District of Columbia Case—*cont'd*

Mr. Chief Justice Holmes, dissenting, said:

The question in this case is the broad one, whether Congress can establish minimum rates of wages for women in the District of Columbia with due provision for special circumstances, or whether we must say that Congress has no power to meddle with the matter at all. To me, notwithstanding the deference due to the prevailing judgment of the court, the power of Congress seems absolutely free from doubt. The end, to remove conditions leading to ill health, immorality, and the deterioration of the race, no one would deny to be within the scope of constitutional legislation. The means are means that have the approval of Congress, of many States, and of those governments from which we have learned our greatest lessons.

In short, the law in its character and operation is like hundreds of so-called police laws that have been upheld.

I am of opinion that the statute is valid and that the decree should be reversed—*Extracts.*

National Prohibition Act Cases

Affecting Domestic and Foreign Ships Within Three-Mile Limit

No. 659. *The Cunard Steamship Company, Ltd., et al.,* vs. *Andrew W. Mellon, Secretary of the Treasury, et al.* (Also cases Nos. 660, 661, 662, 666, 667, 668, 669, 670, 678 693, 694.) Appeals from the District Court for the Southern District of New York. Opinion of the Court delivered by Mr. Justice Van Devanter April 30, 1923.

The decision: These are suits by steamship companies operating passenger ships between United States ports and foreign ports to enjoin threatened application to them and their ships of certain provisions of the National Prohibition Act. The defendants are officers of the United States charged with the Act's enforcement.

It now is settled in the United States and recognized elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbors, bays and other enclosed arms of the sea along its coast and a marginal belt of the sea extending from the coast line outward a marine league, or three geographic miles.

A merchant ship of one country voluntarily entering the territorial limits of another subjects herself to the jurisdiction of the latter. The jurisdiction attaches in virtue of her presence, just as with other objects within those limits. During her stay she is entitled to the protection of the laws of that place and correlatively is bound to yield obedience to them.

We think the act shows very plainly, first, that it is intended to be operative throughout the territorial limits of the United States, with the single exception stated in the Canal Zone provision; secondly, that it is not intended to apply to domestic vessels when outside the territorial waters of the United States, and, thirdly, that it is intended to apply to all merchant vessels, whether foreign or domestic, when within those waters, save as the Panama Canal Zone exception provides otherwise.

In so saying we do not mean to imply that Congress is without power to regulate the conduct of domestic merchant ships when on the high seas, or to exert such control over them when in foreign waters as may be affirmatively or tacitly permitted by the territorial sovereign.

It is of no importance that the liquors in the plaintiffs' ships are carried only as sea stores. Being sea stores does not make them liquors any the less; nor does it change the incidents of their use as beverages. But it is of importance that they are carried through the territorial waters of the United States and brought into its ports and harbors. This is prohibited transportation and importation in the sense of the Amendment and the Act.—*Extracts.*

Dissenting opinion by Mr. Justice Sutherland:

I agree with the judgment of the court in so far as it affects domestic ships, but I am unable to accept the view that the Eighteenth Amendment applies to foreign ships coming into our ports under the circumstances here disclosed.

But interference with the purely internal affairs of a foreign ship is of so delicate a nature, so full of possibilities of international misunderstandings and so likely to invite retaliation that an affirmative conclusion in respect thereof should rest upon nothing less than the clearly expressed intention of Congress to that effect, and this I am unable to find in the legislation here under review.—*Extracts.*

Mr. Justice McReynolds dissented without expressing views.

Open Price Associations Case

The United States vs. *American Linseed Oil Co. et al.* Appeal from the District Court for the Northern District of Illinois. Opinion of the Court delivered by Mr. Justice McReynolds, June 4, 1923.

The decision: The defendants are twelve corporations, commonly referred to as "crushers," with principal places of business in six different States, which manufacture, sell and distribute linseed oil, cake and meal; and Armstrong Bureau of Related Industries. This Bureau conducts a so-called "exchange" through which one subscribing manufacturer may obtain detailed information concerning the affairs of others doing like business. The defendant "crushers" constitute one of the groups who contract for this service.

The obvious policy, indeed the declared purpose, of the arrangement was to submerge the competition theretofore existing among the subscribers and substitute "intelligent competition," or "open competition," to eliminate "unintelligent selfishness" and establish "100 per cent confidence"—all to the end that the members might "stand out from the crowd as substantial co-workers under modern cooperative business methods."

Certain it is that the defendants are associated in a new form of combination and are resorting to methods which are not normal. If, looking at the entire contract by which they are bound together, in the light of what has been done under it the court can see that its necessary tendency is to suppress competition in trade between the States, the combination must be declared unlawful. That such is its tendency, we think, must be affirmed.

We are not called upon to say just when or how far competitors may reveal to each other the details of their affairs. In the absence of a purpose to monopolize or the compulsion that results from contract or agreement, the individual certainly may exercise great freedom; but concerted action through combination presents a wholly different problem and is forbidden when the necessary tendency is to destroy the kind of competition to which the public has long looked for protection. The situation here questioned is wholly unlike an exchange where dealers assemble and buy and sell openly; and the ordinary practice of reporting statistics to collectors stops far short of the practice which defendants adopted. Their manifest purpose was to defeat the Sherman Act without subjecting themselves to its penalties.

The plan is unlawful and an injunction should go against it as prayed by the original bill—*Extracts.*

The Power of the Federal Judiciary to Pass Upon the Constitutionality of Acts of Congress

Precedent Established by Chief Justice Marshall in Famous First* Case

The Case—Marbury *vs.* Madison, 1803

IN this celebrated case decided in 1803, Chief Justice Marshall definitely applied for the first time in the name of the Supreme Court the principle that the federal judiciary enjoyed the power of passing upon the constitutionality of the acts of Congress. The case grew out of an application by Marbury to the Supreme Court for a mandamus compelling the Secretary of State, Madison, to deliver to him a commission as justice of the peace in the District of Columbia—an office to which he had been appointed in the closing days of the Adams's administration. On his accession to power, Mr. Jefferson, specially embittered by the unseemly haste of the Federalists to engross as many officers as possible, refused to deliver to Marbury his commission. In the first part of his opinion, Chief Justice Marshall discussed the questions as to whether Marbury was duly entitled to his commission, and whether mandamus was the remedy. On these two points he came to affirmative conclusions, but the application for mandamus was denied on the ground that the authority given to the Supreme Court, by the Judiciary Act (passed by Congress in 1879), to issue a writ of mandamus in such a case was not warranted by the Constitution.—*The Supreme Court and the Constitution, by Charles A. Beard, 1912.*

The Opinion—Asserting the Power of the Supreme Court to Hold Acts of Congress Void When in Conflict with the Constitution

THE question whether an act, repugnant to the Constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognize certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness is the basis on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns to different departments their respective powers. It may either stop here, or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined and limited; and that those limits may not be mistaken, or forgotten, the Constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction between a government with limited and unlimited powers is abolished, if those limits do not confine the persons on whom they are imposed, and if acts prohibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the Constitution controls any legislative act repugnant to it; or, that the legislature may alter the Constitution by an ordinary act.

Between these alternatives there is no middle ground. The Constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and, like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the Constitution is not law; if the latter part be true, then written Constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.

Certainly all those who have framed written Constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature repugnant to the Constitution is void.

This theory is essentially attached to a written Constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not therefore to be lost sight of in the further consideration of the subject.

If an act of the legislature, repugnant to the Constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? This would be to overthrow in fact what was established in theory; and would seem, at first view, an absurdity too gross to be insisted on. It shall, however, receive a more attentive consideration.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if the law be in opposition to the Constitution; if both the law and the Constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the Constitution; or conformably to the Constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.

If, then, the courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply.

Those, then, who controvert the principle that the Constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining the courts must close their eyes on the Constitution, and see only the law.

This doctrine would subvert the very foundation of all written Constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that if the legislature shall do what is expressly

**The question of the constitutionality of a federal statute was first really presented to the Supreme Court in United States v. Todd in 1792, but no complete record of this case was made.*

forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers with narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions, a written Constitution, would of itself be sufficient, in America, where written Constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the Constitution of the United States furnish additional arguments in favor of its rejections.

The judicial power of the United States is extended to all cases arising under the Constitution.

Could it be the intention of those who gave this power, to say that in using it the Constitution should not be looked into? That a case arising under the Constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases, then, the Constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read or to obey?

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

The oath of office, to be imposed by the legislature, is completely demonstrative of the legislative opinion on this subject. It is in these words: "I do solemnly swear that I will administer justice without respect to persons, and do equal right to the poor and to the rich; and that I will faithfully and impartially discharge all the duties incumbent on me as ————, according to the best of my ability and understanding, agreeably to the Constitution and laws of the United States."

Why does a judge swear to discharge his duties agreeably to the Constitution of the United States, if that constitution forms no rule for his government? If it is closed upon him, and cannot be inspected by him?—*Extracts.*

Present Members of U. S. Supreme Court

CHIEF JUSTICE	STATE	APPOINTED
William Howard Taft	Ohio	1921
ASSOCIATE JUSTICES		
Joseph McKenna	California	1897
Oliver Wendell Holmes	Massachusetts	1902
Willis Van Devanter	Wyoming	1910
James Clark McReynolds	Tennessee	1914
Louis Dembitz Brandeis	Massachusetts	1916
George Sutherland	Utah	1922
Pierce Butler	Minnesota	1922
Edward Terry Sanford	Tennessee	1923

Chief Justices of U. S. Supreme Court, 1789-1921

NAME	STATE	TERM	SERVICE
John Jay	New York	1789–1795	6
John Rutledge *	South Carolina	1795	....
Oliver Ellsworth	Connecticut	1796–1801	5
John Marshall	Virginia	1801–1835	34
Roger B. Taney	Maryland	1836–1864	28
Salmon P. Chase	Ohio	1864–1873	9
Morrison R. Waite	Ohio	1874–1888	14
Melville W. Fuller	Illinois	1888–1910	22
Edward D. White†	Louisiana	1910–1921	11
William Howard Taft	Ohio	1921	

* *Commissioned July 1, 1795 (in recess), presided at August term 1795. Not confirmed.*

† *Also served as Associate Justice from 1894 to 1910.*

Biographical Sketch of the Chief Justice of the United States Supreme Court

WILLIAM HOWARD TAFT was born at Cincinnati, September 15, 1857; graduated at Woodward High School, Cincinnati, 1874; B. A., Yale, 1878; LL. B., Cincinnati Law School, 1880. Admitted to Ohio bar, 1880; law reporter Cincinnati Times, and later of Cincinnati Commercial, 1880; assistant prosecuting attorney Hamilton County, Ohio, 1881–1883; practiced law at Cincinnati, 1883–1887; assistant county solicitor Hamilton County, 1885–1887; judge superior court, Cincinnati, 1887–1890; solicitor general of United States, 1890–1892; United States circuit judge, sixth circuit, 1892–1900; professor and dean law department, University of Cincinnati, 1896–1900; president United States Philippine Commission, March 12, 1900, to July 4, 1901; first civil governor of Philippine Islands, July 4, 1901, to February 1, 1904; Secretary of War in Cabinet of President Roosevelt, February 1, 1904, to June 30, 1908, and in charge of construction of Panama Canal during that incumbency; 1906, sent to Cuba by President Roosevelt to adjust insurrection there, and acted a short time as provisional governor. Elected November 3, 1908, twenty-seventh President of the United States, for term March 4, 1909, to March 4, 1913; renominated for the Presidency, June, 1912, by Republican National Convention, Chicago, but defeated in November election following by Woodrow Wilson; Kent professor of law, Yale, April 1, 1913-1921. Appointed member National War Labor Board, April, 1918, and cochairman of same until board dissolved, August, 1919. Returned to Yale as Kent professor after leave of absence for year. President American National Red Cross, 1906–1913; president American Bar Association, 1913; president League to Enforce Peace from 1915 to 1921. Appointed by President Harding, and confirmed by the Senate, as Chief Justice of the United States, June 30, 1921. Took official oath, July 7, 1921, and was installed October 3, 1921. *Extract from "Congressional Directory."*

Review of Attacks on U. S. Supreme Court Following Important Decisions

1819—In the year 1819, the Court upheld the right of the Bank of the United States to be freed from an unconstitutional State tax. Marshall's great opinion in *McCulloch* v. *Maryland*, was assailed, at the time of its delivery, as "fraught with alarming consequences," "undermining the pillars of the Constitution," "a total prostration of State rights and the loss of the liberties of the Nation."

1837—Eighteen years later, however, in 1837, on its

decision of the *Charles River Bridge Case*, by which the Court, instead of upholding a corporate monopoly, overthrew one, it was assailed as the destroyer of property, and as the enemy of all investors in corporate stock.

1848—Eleven years later, in 1848, when it upheld the right to take by eminent domain chartered rights, in *West River Bridge Co.* v. *Dix*, it was praised as having dealt "a great blow at monopoly" and "triumphantly sustained the republican doctrine that a corporation has no more right than individuals."

1854—Nine years later, however, in 1854, the same Court was assailed with the contrary cry that it was corporation-ridden, when by the decision in the *Bank Tax Exemption Cases*, it held an Ohio statute invalid.

1850–55—During the years 1850 to 1855 (long before the *Dred Scott Case*), the Court was continuously and savagely assailed in Congress by anti-slavery Senators and Congressmen, and by the anti-slavery press.

1858—In 1858, when the Court sustained the validity of the Fugitive Slave Law in the Booth Cases and when the Wisconsin Courts and the Legislature actively adopted the policy of Nullification, attacks on the Court by Republican and anti-slavery statesmen and newspapers were unmeasured in their language.

1861—Even during the Civil War, and after the new appointments by President Lincoln had given a majority of the Justices to the Republican party, the failure of the Court to decide all cases arising out of the war, in exact consonance with the views of Republican leaders, led to continued attack.

1867—In 1867, the Court was subjected to a most violent assault for its decision in the famous *Milligan Case*, in which it upheld the rights of the citizen against the Executive, and denied the latter's right to institute military Courts, outside the active theatre of war. The decision is now regarded as one of the great bulwarks of American liberty.

The Radical Reconstructionists, who desired to see all participants in the cause of the Confederacy treated as traitors and denied any civil rights or privileges, were still further enraged by two decisions of the Court, rendered on January 14, 1867, in *Cummings* v. *Missouri* and *Ex parte Garland*, 4 Wall. 277, 333,—decisions which revealed the Court as wholly unaffected by the tumult raised by its Milligan decision. The attacks on these decisions were again of the most violent character.

1868—In the years since 1868, a series of criticisms followed almost every important decision of the Court.

1895—The year 1895 was notable for the decision of three great cases in which the public took the liveliest interest. In the first, decided January 21, the Court passed for the first time on the application of the Sherman Anti-Trust Act to commercial corporations, and in *United States* v. *E. C. Knight Co.*, 156 U. S. 1,—the *Sugar Trust Case*,—held that, on the facts presented, the corporations involved in the combination refining sugar were not engaged in interstate commerce. The result was a disappointment to those who relied on the Act as a destroyer of the trusts. The second case involved the constitutionality of the Income Tax imposed in the Wilson-Gorman Tariff Act in President Cleveland's Administration, *Pollock* v. *Farmers' Loan and Trust Co.*, 157 U. S. 429, 158 U. S. 601; and the unfortu-

(*Continued on page 282*)

Proposals For "Curbing the Supreme Court" in Its Jurisdiction and Judicial Power

The Hayden Resolution

H. J. Res. 15—Proposing an amendment to the Constitution of the United States, as follows: "Article —. No law shall be held unconstitutional and void by the Supreme Court without the concurrence of at least all but two of the judges." Introduced in the House April 11, 1921, by Representative Hayden, Democrat, from Arizona. Referred to the House Committee on the Judiciary. Died in Committee.

The McSwain Bill

H. R. 9755—A bill regulating procedure in the Supreme Court of the United States, as follows: "That in any case heard and decided by the Supreme Court of the United States where is drawn in question a statute of any State of the United States on the ground that said statute is charged to be in conflict with the Constitution of the United States, such statute of a State shall not be held and declared to be in conflict with the Constitution of the United States, or any amendment thereto, or treaty made, or Act of Congress passed, in pursuance thereof, unless at least seven members of the said court decide, agree, and concur in the opinion that such statute is so unconstitutional, null, and void." Introduced in the House Jan. 5, 1922, by Representative McSwain, Democrat, from South Carolina. Referred to House Committee on the Judiciary. Died in Committee.

The Frear Resolution

H. J. Res. 436—Proposing an amendment to the Constitution of the United States, as follows: "Article —. Section 1. Congress shall have power to determine how many members of the Supreme Court shall join in any decision that declares unconstitutional, sets aside, or limits the effect of any Federal or State law, and may further provide by law for the recall without impeachment proceedings of any judge of the court, or a review and setting aside of any such court decision providing that not less than two-thirds of the vote of both Houses shall agree to such recall or review." Introduced in the House February 6, 1923, by Representative Frear, Republican, from Wisconsin. Referred to House Committee on the Judiciary. Died in Committee.

The Borah Bill

S. 4483—A bill providing the number of judges which shall concur in holding an Act of Congress unconstitutional. "That in all suits now pending, or which may hereafter be pending, in the Supreme Court of the United States, except cases affecting ambassadors, other public ministers, and consuls and those in which a State shall be a party, where is drawn in question an Act of Congress on the ground of repugnancy to the Constitution of the United States, at least seven members of the court shall concur before pronouncing said law unconstitutional." Introduced by Senator Borah, Republican from Idaho, February 5, 1923. Referred to the Senate Committee on the Judiciary. Died in Committee.

Senator LaFollette's Proposal

Would allow Congress by a two-third vote to overrided a decision by the U. S. Supreme Court nullifying a law enacted by Congress. Advocated by Senator LaFollette at the Convention of the American Federation of Labor, June 14, 1922, and adopted by the Convention.

Senator-elect Fess's Proposal

In a letter given to the press under date of March 26, 1923, Senator Fess proposes that not less than six of the nine members of the Supreme Court be required to pronounce a law unconstitutional and void.

Is the Proposal to "Curb" Powers of Supreme Court Sound?

Pro

Hon. Robert M. LaFollette

U. S. Senator, Republican, Wisconsin

WE have never faced the fundamental issue of Judicial Usurpation squarely.

The time has now come to do so. It would require a dozen constitutional amendments to correct the evils of the decisions which the court has handed down within the past three or four years.

The time has come when we must put the axe to the root of this monstrous growth upon the body of our government. The usurped power of the Federal courts must be taken away and the Federal judges must be made responsive to the popular will.

The question is, which is supreme, the will of the people or the will of the few men who have been appointed to life positions on the Federal bench.

The power which the court now exercises to declare statutes of Congress unconstitutional is a usurped power without warrant in the Constitution, and it is absolutely certain the Constitution would never have been adopted had the men at that time believed that the court they were providing for would assume the powers now exercised by our Federal judges.

I would amend the Constitution so as to provide—(1) That no inferior Federal judge shall set aside a law of Congress on the ground that it is unconstitutional; (2) That if the Supreme Court assumes to decide any law of Congress unconstitutional, or by interpretation undertakes to assert a public policy at variance with the statutory declaration of Congress, which alone under our system is authorized to determine the public policies of government, Congress may by repassing the law nullify the action of the court.

Thereafter the law would remain in full force and effect precisely the same as though the court had never held it to be unconstitutional.

The Constitution gave to the President of the United States a veto upon legislation, in order that the Executive might be able to protect itself against encroachments. But it also gave to the Congress the power to assert its will by repassing the law even after it had been vetoed. This was necessary in order to prevent the President from using his veto to block all progress and make himself a despot.

The Constitution did not give the courts a veto, but repeatedly refused to permit them even to participate in the exercise of the Presidential veto power. Nevertheless, the courts have asserted not a veto power while laws were in the making, but have usurped the far greater power to nullify laws after they have been enacted and by the process of so-called interpretation to declare the public policy.

We are confronted with a situation wherein we must make a choice that will determine the destiny of this nation in all the generations to come. This choice is simple but fateful. Shall the people rule through their elected representatives or shall they be ruled by a judicial oligarchy? Shall we move forward in our development as a nation, carrying out the will of the people as expressed by their ballots or shall all progress be checked by the arbitrary dictates of five judges until the situation becomes so desperate that it can no longer be endured?

The American nation was founded upon the immortal principle that the will of the people shall be the law of the land. The courts have forgotten this, but the people have not. When they have an opportunity they will overwhelm-

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Con

Hon. George Sutherland

Associate Justice of the U. S. Supreme Court, formerly U. S. Senator from Utah

THE chief value of the written Constitution, with its comprehensive system of checks and balances, is that it operates to prevent ill-considered and impulsive action—affords a period for sober reflection—but whenever the people have deliberately determined upon a step of real progress it will be found that the Constitution as interpreted by the courts rarely presents an obstruction, and in that rare and occasional instance it will be far better to reach the desired result by the slow process of amendment than by the drastic and dangerous expedient of constitutional violation.

The spirit of impatience to which I have referred finds a most unfortunate manifestation in the intemperate and frequent denunciation of the action of the courts in declaring to be unconstitutional statutes which have been passed by Congress or State legislatures in response to popular demand. Notwithstanding the fact that the recognized judicial doctrine for more than a century has been that the courts in cases properly before them have power to decide whether an act of legislation is opposed to the Constitution, the contrary is still vigorously asserted by many people, and the exercise of the power denounced as judicial usurpation.

Those who suggest that the court must construe the Constitution in accordance with the popular will, or that judicial interpretation should be subject to be overruled by popular opinion, however expressed or ascertained, are simply advocating a method by which the rights of some of the parties to a compact shall be subordinated to the will of the other parties who happen for the time being to preponderate in numbers. Such a condition would not only set the administration of the law afloat upon a sea of uncertainty, but would be contrary to the underlying principles of the constitutional compact, and in the end would subvert the liberties of the individuals, who in alternation may constitute the majority today and the minority tomorrow, a result which the whole genius and spirit of the constitutional compact were plainly intended to prevent.

I suggest no doubt respecting either the right or the capacity of the people to govern themselves. In the United States they have always done that and they do so now. The question, however, is not whether the people shall govern, but it is by what method can they govern best—by their own direct action or through the governmental agencies which they have created. The tripartite division of governmental powers laid down in the Constitution is, I believe, essential to the preservation of the people's liberties. All history has demonstrated that where the power to make laws, to execute laws, and interpret laws is vested in the same individual or body, despotism inevitably results.

This important power of the courts to declare statutes void should be exercised, as it has been almost universally exercised, only where the infringement of the Constitution is so plain as to admit of no reasonable doubt in the mind of the judge, but if constitutional and orderly government is to endure there is but one course for the courts to follow, and that is to set their faces steadily and unswervingly against any palpable violation of that great instrument, no matter how overwhelming in the particular instance may be the popular sentiment or how strong the necessity may seem, for if the door be opened to such violation or evasion on the ground of necessity we shall be unable to close it against expediency or mere

U. S. Senators Discuss Proposal to "Curb" Powers of Supreme Court

Pro

Hon. Robert L. Owen

U. S. Senator, Democrat, Oklahoma

IN my judgment, it is a violation of the Constitution of the United States for the Congress of the United States to abdicate its right to determine the constitutionality of its own acts.

The Constitution of the United States does not give to any court—district court, circuit court, or Supreme Court—the right to pass upon and declare unconstitutional the acts of the sovereign assembly of this Nation. I know perfectly well that all the law schools have taught that the Supreme Court has the right to nullify acts of Congress and set them aside; and it is not unnatural that the law schools should teach that this is the law. I deny that it is the law, however, and I deny the right of Congress to abdicate its powers and duties to the people of the United States and permit its laws to be nullified by any court.

Any Federal judge who declares any act passed by the Congress of the United States to be unconstitutional should be declared to be guilty of violating the constitutional requirement of "good behavior," upon which his tenure of office rests, and he should be held by such decision *ipso facto* to have yielded his office, and the President of the United States should be authorized to nominate a successor to fill the position vacated by such judicial officer.

Congress by statute established a Supreme Court and the executive departments, and fixed their powers in accordance with the Constitution and in accordance with the power vested in Congress as the law-making power. Congress fixed the number of judges of the Supreme Court. It can add to that number now, or it can diminish the number by an act of Congress. To say that the Supreme Court has coequal power with the Congress of the United States is obviously preposterous.

I am speaking of relative power, the power given under the Constitution to the Congress of the United States as compared with the power given to the Supreme Court by the Constitution. The only power they were given under the Constitution was to have appellate power with such exceptions as Congress saw fit to make under such regulations as Congress saw fit to make, and the negligible original jurisdiction in cases where a State was involved or where ambassadors or foreign ministers were involved.

Congress has the duty imposed upon it under the Constitution to fix that appellate jurisdiction and make such exceptions and such regulations as Congress sees fit to make, and one of the exceptions which I insist shall be made is that the Supreme Court shall not nullify any part of any act passed by the Congress of the United States, and shall not declare any act unconstitutional and shall not assume to declare national policies. It is said that the Congress may make mistakes and therefore the mistakes should be rectified by the court. It might make mistakes. It is less apt to make mistakes than a smaller number of conscientious God-fearing men discharging their duty to the Republic.

In the only important differences that have ever arisen between the Congress of the United States and the Supreme Court, so far as I can recall at this moment, the Supreme Court was positively wrong and adopted a policy highly mischievous to the Republic, as in the case of the Dred Scott decision, which led immediately to the bloody Civil War of 1861–1865; as in the legal-tender case; as in the income-tax case. I am talking of the power of Congress under the

(*Continued to page 282*)

Con

Hon. John K. Shields

U. S. Senator, Democrat, Tennessee

THE propositions for "curbing the Supreme Court" in its jurisdiction and judicial power now proposed, if successful, would result in the absorption by the legislative department of all judicial power—a condition subversive of all liberty and a change in our form of Government destructive of the chief checks and balances which the fathers provided to prevent usurpation.

Our dual form of government required that there be lodged somewhere in the fundamental law supreme power to construe the Constitution. This power is essentially a judicial power and the exercise of it a judicial function. Without such power the Constitution would be without vigor or life and its limitations unenforcible, as the history of our Government has conclusively demonstrated. The Congress could exercise all the powers of the Government and the Bill of Rights would be subject to the whim, caprice, passion and political exigencies influencing temporary majorities of each succeeding Congress, according to their views and political policies. There would be no protection for the rights of the minority. Congress has passed such laws, and but for the power of the courts they would have been enforced.

The jurisdiction of the Supreme Court to review the judgments of State courts is supported by the same reasons and the same provisions of the Constitution. Without this jurisdiction there might be as many different interpretations and constructions of the Federal Constitution and laws as there are States.

The proposition to exclude from the appellate jurisdiction all cases involving constitutional questions, if carried out, would be revolutionary and destructive of our form of government.

The Constitution after stating the cases to which the judicial power shall extend, states those of which the Supreme Court shall have original jurisdiction and then confers appellate jurisdiction in these words: "In all other cases the Supreme Court shall have appellate jurisdiction both as to law and to fact with such exceptions and under such regulations as the Congress may make."

These words do not relate to the judicial powers of the court, which are conferred in previous provisions but to the limitation and regulation of the appellate jurisdiction. The broad distinction between judicial power, which is the power to determine the facts and the law in cases coming before the court, a power inherent in all courts, unless expressly withheld, and the jurisdiction, which relates to the character of cases it is authorized to decide, is well established. When the jurisdiction is conferred, the judicial power applies and is within the exclusive province of the court and uncontrollable. A contrary rule would absolutely destroy the independence of courts.

Whether Congress can by repeal of all these statutes make inoperative the appellate jurisdiction conferred by the Constitution is a matter of serious consideration. Such legislation would, if effective, make impossible the exercise of the greatest and most important part of the jurisdiction of the court (the original jurisdiction being very limited) and that which was the chief object of the creation of the Judicial Department. The constitutional vestiture of appellate jurisdiction is absolute, the extent and the process for its exercise alone being left to the Congress, for which it is its solemn duty to provide, and it is inconceivable that it will fail to

Proposal to Destroy Court's Power to Nullify Acts of Congress

Pro

Hon. Edwin F. Ladd

U. S. Senator, Republican, North Dakota

IN my opinion, Congress has been immorally lax in its duty in quietly permitting the Supreme Court to assume various powers, and it is our duty to the people to see that an end is put to this gradual usurpation of power by the court.

The Supreme Court of the United States must not assume the attitude of believing that ultimate power rests in its hands, that it is not subject to review, that it is responsible only to the Constitution, and that the Constitution is just what the court interprets it to be. Under the Constitution, Congress is the supreme branch of government and the Supreme Court must depend upon Congress for a definition of its rights in the use of its appellate jurisdiction.

Certainly we should have no four to five decisions on Federal legislative acts. No Act of Congress should be declared unconstitutional unless by a vote of eight members of the Supreme Court.

One thing is certain and that is that the Congress which enacted the Judiciary Act of 1789, never dreamed that it would be at any time so construed as to be the instrument of judicial usurpation, or that the courts would arrogate to themselves the power to nullify every act of remedial legislation necessitated by our prodigious industrial development and consequent growth of extortionate monopolies and law-defying trusts and combines.

The members of the Supreme Court of the United States as now organized are in no way responsible to the people, whose public servants they are supposed to be, and nobody is responsible for them. They are not always selected and appointed because of their distinguished legal attainments, their unselfish devotion to the people's interests. Often, these distinctions would be regarded as insuperable disqualifications in the eyes of the invisible power behind the appointing power.

Is it believable that the legislative branch of the government would deliberately create a power superior to themselves and which could render their most important and painstaking work absolutely worthless?

The members of the legislature are directly responsible to the people for their public acts. They are the guardians of public virtue and the criterions of political ethics. They may, indeed, command what is morally wrong and prohibit what is morally right, thus by embodying iniquity in the law, make the people workers of iniquity. But if a law is iniquitous in its conception and unjust in its operation, the remedy lies not in an appeal to the judiciary to declare the law void, but to the people themselves who have delegated their authority to untrustworthy representatives. It is to them they have intrusted their power, and not to the judiciary.

In the light of these preliminary observations, by what rule of interpretation, by what canon of construction, by what process of reasoning familiar to the rational mind can the conclusion be reached, that the legislative branch of the government could, even if it so desired, transfer to an uncontrolled body of its own creation the legislative function conferred upon them by the people? Such a conclusion would seem preposterous. It sins against common sense. It is without precedent or parallel in the annals of representative government. This indefensible usurpation has made this otherwise great and glorious republic an enigma among the progressive nations of the world.—*Extracts from "The Dearborn Independent," June 2, 1923.*

Con

William I. Schaffer

Justice of the Supreme Court of Pennsylvania

THE proposition is that there shall be denied to the Supreme Court of the United States the power, which it has always exercised, to declare whether or not acts of Congress are in consonance with the Constitution, whether that power shall be taken away from the court and lodged in Congress, without appeal, or whether it shall remain, as it has remained since the foundation of the government, with the Supreme Court of the United States.

Now what does this proposal mean? Its purpose is to make a change in government in order that certain legislation now impossible under the Constitution shall be passed, and that the Supreme Court shall not have power to say that it is not in agreement with the Constitution. But what a change! To bring this about our whole government, national and state, is to be revolutionized. And then what would transpire?

The Constitution guarantees all those liberties which go to make life worth while. It was written by men, framed by men, adopted by men, who saw what a terrible thing it is in the world to have non-restraint and unrestricted power.

It was written in the Constitution that there should never be in this land any state religion established, and so, as the capstone of this government of ours we have written into it a fundamental law that there shall be no state church and that every man shall worship as his conscience dictates. Yet under this proposed amendment that right could be stricken down.

Under this proposal, the Constitution could be violated to the extent that all the powers of the states could be stricken down, and state government would be the mutest and the vainest thing in all the world; or when any great group of men wanted some particular thing done which they could not get their neighbors to do, their State to do, they would go down to Washington and get Congress to do it, and nobody could review it and nobody could say it nay. Thus all the states, instead of being sovereign governments within themselves, save as they have delegated power to the federal government, would be nothing but vassals to the great centralized power in Washington.

This constitutional enactment advocated by a great group of our people is more than a constitutional enactment; it is a proposed change in government so great, so vital, and of such enormous consequence to the people of this republic that it behooves each man and each woman of us to see that it does not become a law.

This government of ours is the only one that is stable and secure. Why? Because it is founded upon the Constitution. The broadest thinking, governmentally, emanating from Europe today, comes from the young premier of Czecho-Slovakia, who, speaking to all the world, has said that the rest of mankind, if it is to stabilize itself, will have to do what we did in America 140 years ago, write into a Constitution the charter of its liberties and the rights of its citizens.

Now when all the world looks towards us with hope, are we going to lend ourselves to the doing of that thing which would throw overboard our sheet anchor, upset that which has made this country what it is, end that wonderful balance which we have maintained between legislative, executive, and judicial power, and give to Congress supreme power? Neither in King nor Congress nor anywhere else should supreme power be lodged.—*Extracts from article in The Constitutional Review, April, 1923.*

U. S. Representatives Discuss Proposal to "Curb" Powers of Supreme Court

Pro

Hon. James A. Frear

U. S. Representative, Republican, Wisconsin

THE powers of the Supreme Court are defined in three short sections of Article III, and in no place in the Constitution is it suggested that any court is empowered to set aside any act of Congress.

Modern interpretation seeks to read into our Constitution that the Supreme Court at Washington is granted jurisdiction wherever the instrument is silent or fails to anticipate the new order.

The story of claimed usurpation of power is familiar, and when we read a pronouncement by the Supreme Court setting aside some law passed by Congress after months of study and debate by the two Houses or when amendments to the Constitution after ratification by three-fourths of the States are emasculated we are prone to ask by what power is a man taken from the Halls of Congress or from private life, given superhuman intelligence or infallible judgment when placed in the court room? Possibly a hundred fairly able lawyers in Congress may differ in their judgment, but the novitiate justice becomes *ipso facto* omniscient when he takes his seat. Thereafter he is able to pass upon and hold nugatory the "seeming laws" enacted by Congress, and the country must wait in suspense to learn when a law is not a law, to be determined by this novitiate.

I do not minimize the respect held for the court or the experience or ability of its members, but justices are very human, sometimes not of extraordinary attainments, often with recognized prejudices or infirmities that call for careful consideration when the court by a vote of 5 to 4 sets aside or emasculates a law first passed by Congress, second approved by the President, pursuant to a vote of the people in 36 States who ratified the sixteenth amendment.

From my reading it appears:

First. The Constitution placed all legislative power in Congress.

Second. The only check lay in the Executive's veto.

Third. The people retained the right to control both branches of government at the polls.

Fourth. The Supreme Court is given no power to set aside any State or Federal law.

Fifth. Such power has occurred by usurpation of jurisdiction.

Sixth. Supreme Court judges may be chosen by a fallible Executive.

Seventh. They are the only officers in the land selected for office for life.

Eighth. Under existing practice one justice may exercise more power than all the remainder of the Government combined.

Ninth. The court may ignore the will of the people expressed by Constitutional amendment.

Tenth. The court, instead of the people, Congress, and the Executive, is now the supreme law of the land.

Eleventh. This situation is contrary to the Constitution and our form of government.

Twelfth. Congress and the States can correct the wrong by proper legislation that will rightly interpret the meaning of the Constitution.

When no authority exists under the Constitution to reach this situation, either by Congress or the people, it remains for Congress to provide some relief for submission to the people. As a tentative suggestion it is proposed that deci-

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Con

Hon. Harry B. Hawes

U. S. Representative, Democrat, Missouri

IT is proposed by constitutional amendment to take from the Supreme Court the power of judicial review of legislative enactment.

It is further proposed that congressional enactments may be reviewed by the court, but if declared a violation of the Constitution by the court, then Congress may by subsequent enactment replace the law upon the statute books and further court review be restrained.

If Congress passes a good law once, it is to remain, but in order to make a bad or unconstitutional law constitutional it will be required to do the bad thing twice, and by this repetition bad law becomes as good as good law.

The place of judicial power in our National Government is not understood; there seems some mystery about it; and when it is assailed, some may carelessly and without examination agree with its critics.

First. We must understand that the judicial power of the Government is created by the joint act of both the executive and legislative branches, and then upon its creation it becomes a check upon both of the branches which created it.

Second. That while Supreme Judges are appointed for life, the legislative branch—the House and Senate—may remove by impeachment.

Third. That the Executive—the President—may be punished for an unwise selection by a subsequent defeat administered by the electorate.

Fourth. That during the nearly century and a half of our national history no scandal and but little criticism has been honestly directed against either the integrity or ability of the members of our Supreme Court.

To destroy, by constitutional amendment, one of the three coordinate and foundation branches of our Government means the destruction of the present American form of government and the setting up of an entirely new and different system.

It would remove the balance of power between the executive and the legislative.

It would destroy the judicial check upon both.

It would either increase the power of the executive and lead the way to monarchy or increase power of the legislative and destroy the force of the executive.

It would take from the American plan of government its marked difference from that of any other nation which preceded its formation.

It would involve the rewriting of thousands of laws by both State and National Governments.

It would destroy the arbiter which decides disputes between States and citizens of States.

It would leave our Bill of Rights, so essential to personal liberty, without special official defender.

It would remove all protection for the right of the minority.

It would place unlicensed and unlimited power in the hands of a majority.

It would take away the balance wheel which causes the affairs of government to run smoothly and methodically.

It would destroy our dual form of sovereignty.

It would take from the Government its fine conscience to judicially determine right from wrong by a solemn tribunal unswayed by partisan heat or temporary excitement, which

Proposal to Change "5-4" Decisions to "7-2" Discussed

Pro

Hon. John J. McSwain

U. S. Representative, Democrat, South Carolina

IS it constitutionally proper for Congress to prescribe the vote in the Supreme Court as to some of its decisions? It is always competent for the legislative authority to prescribe the rules of practice and procedure prevailing in courts of all degree. The Constitution merely provides that there shall be a Supreme Court, but does not prescribe the number of justices nor any of the procedure respecting same. Congress has prescribed the terms of the court, and has prescribed what shall constitute a quorum of the court, and the proposed legislation merely seeks to prescribe the quorum of the courts as to decision on constitutional questions. In other words Congress could prescribe that the Supreme Court should not have any session nor attend to any business unless all nine members of the court are present. So Congress can prescribe that at least seven members of the court must agree that an act of Congress or a statute of a State is in conflict with the fundamental law before it can be held void on that ground.

Courts approach the consideration of the constitutionality of a statute with the declared major premise that the act is presumed to be constitutional and must be found to be unconstitutional beyond a reasonable doubt in order to justify a court in frustrating the solemn deed of a coordinate branch of the Government. And yet in the face of this fundamental proposition we find five members of the court holding that State statutes and acts of Congress are unconstitutional, while four members of the same court file vigorous and logical dissenting opinions, arguing that these legislative acts are constitutional. We therefore have a right to ask why it is that the learned and laborious dissenting opinions do not raise a reasonable doubt in the minds of the majority. The effect is that one man, the fifth member of the majority, is exercising the power to overthrow the will of Congress and the approval of the President, who voices the majority of more than 100,000,000 people.

I concede that partisan zeal and prejudice from various causes may result in acts of Congress and statutes of States that are unconstitutional, and in such case there should be power vested in the courts so to declare. But the principles of the Constitution and of constitutional interpretation have been thoroughly understood for more than 125 years. There is no excuse for a five to four decision. If the Constitution has been violated by an act of Congress or of a State legislature, that violation ought to be so manifest that at least seven judges out of nine can see it and declare it. In fact, it would not be so unreasonable to require a unanimous decision on the proper construction of a Constitution which has constantly been before the courts for more than 125 years, as it is to require the unanimous verdict by a jury which hears parole testimony from conflicting witnesses.

The tendency to have State legislation reviewed in the Supreme Court of the United States is but one tendency toward the accumulation of all governmental power into Federal hands. The minority in the various States, especially the extreme reactionary element, seems determined to bring every progressive piece of legislation under the review of the Supreme Court of the United States in the hope of having the same declared to be unconstitutional, on the ground that the same is charged with violating the fourteenth amendment with respect to due process of law and equality of laws.—*Extracts from speech in the House of Representatives, Jan. 6, 1922.*

Con

Ira Jewell Williams

Of the Philadelphia Bar

NO citizen, man or woman, who is a supporter of government by constitutional law in the United States, can afford to overlook or minimize the powerful efforts that are being made, even by certain members of the United States Senate, to in part nullify or wholly invalidate the Constitution itself—and hence constitutional government—by materially curtailing, or even entirely destroying, the powers of the Supreme Court, the tribunal by which, under the terms of the great covenant itself, the Constitution always has been interpreted and sustained, as against Legislative or Congressional enactments repugnant to its provisions.

The rights of the State of Idaho, or of the people of Idaho, guaranteed by the United States, are infringed by an Act of Congress. To the people of Idaho the thing seems palpable and obvious. The judges of the District Court of the United States, and the judges of the Court of Appeals, sustain the Constitution and preserve the asserted rights of the State and its people. An appeal is taken to the Supreme Court of the United States. If the amendment proposed by the Senator from Idaho should be enacted, the decision of the lower Federal judges must be reversed unless seven justices of the Supreme Court of the United States concur in affirming it. That is to say, the tribunal charged with the final duty of maintaining the Constitution, and, therefore, of construing the Constitution and applying it to actual cases, may vote two to one in favor of the Constitution and against the Act, yet the Act would stand.

Can such an amendment change the power and duty of the Supreme Court of the United States? It does not attempt to deprive the court of all power to construe and support the Constitution. It recognizes the long-acquiesced-in view that the written Constitution is worthless unless somebody has the right and duty to make its provisions effective in particular cases. The Supreme Court itself was created by the Constitution. The Constitution recognizes the division of governmental powers into legislative, executive and judicial. The Constitution itself places express limitations on the powers of the executive and legislative branches. The Constitution itself places express limitations upon the powers of the Federal Government. In the very nature of the case, there is no way of making these limitations effective, except through the action of the judges of the courts, sworn and in duty bound to enforce such limitations. These limitations, as we have seen, are for the protection of the individuals and of the States. They are in recognition of the rights of man, which are so sacred and fundamental as not to be the subject of waiver by political representatives, or barter by political compact.

One of the complaints against the existing system is that the Supreme Court of the United States declares acts unconstitutional by a five to four vote. The objection is more apparent than real. In the last five years few Acts of Congress have been declared unconstitutional by a five to four vote.

If five of nine justices unite in finding that the Constitution shelters and protects a citizen, is it not better that such view should prevail than to scrap the vast body of Constitutional law, and the multitude of adjudicated cases decided sometimes by six, seven, eight or nine justices, which decisions have become a part of the fundamental law of the land? Would not scrapping these decisions in effect scrap the Constitution itself? For what respect would that instrument inspire if its precepts are to be enforced only in case seven out of nine judges are in favor thereof?—*Extracts from "The Manufacturer," May, 1923.*

Proposal to Change "5-4" Decisions to "7-2" Discussed

Pro

Hon. William E. Borah
U. S. Senator, Republican, Idaho

THE five-to-four decisions of our Supreme Court upon great constitutional questions are always a matter of deep regret. These decisions seem to justify a want of respect for the decisions of that great tribunal and seem to breed an atmosphere of distrust in the solidity and worth of our Federal judicial system. They have given rise to more criticism of the court than any other one thing which I am able to recall. When a measure has passed the Congress and received the approval of the President it seems unreasonable that such a measure should be rejected by a decision in which no more than five out of nine judges concur in its unconstitutionality. In the last analysis it comes down to the proposition where one justice has the power to uphold or defeat the law; and in a celebrated case a change of view upon the part of the one judge resulted in holding the law constitutional upon one occasion and unconstitutional upon another. It gives to the whole proceeding an element of chance. Nothing outside of actual misconduct could be more calculated, in my opinion, to detract from the dignity and prestige of the court or more likely to undermine it in the opinion of the American people.

Has the Congress under provision of the Constitution the power to prescribe the number of judges which shall concur before a statute shall be declared unconstitutional? From the earliest days of the Republic Congress has determined not only the number of justices but also the number which shall constitute a quorum. The act of 1789 contains such a provision, and that provision is still in the law, providing that six justices shall constitute a quorum. Congress has also provided for the court's adjournment in case of no quorum. It has given to less than a quorum the power to make necessary orders touching a pending case.

The "judicial power" of the United States is vested in one Supreme Court and such inferior courts as the Congress may create. That "judicial power," it will be readily conceded, cannot be invaded by the legislative branch of the Government. But the line which separates the appellate jurisdiction of the court under proper "regulation" from an unwarranted invasion of the "judicial power" is not at all times clear and distinct. Is the Congress invading the "judicial power" when it declares the number of justices required to constitute a quorum? I think not. Is it derogating from the "judicial power" when it provides by law that less than a quorum shall be authorized to do certain things? It would seem not. Is the power to grant certain writs, as provided by statute, by one justice an invasion of the "judicial power"?

In other words, may we not provide under the scope of "regulations" touching the appellate jurisdiction that before an act of Congress shall be declared void at least seven judges shall concur? It seems to me that we have that power. If we have the power, it is perfectly clear that we should use it. Unless we do make provision of this nature we shall have to meet the situation after it becomes more serious. We have already amended the Constitution once because of a 5 to 4 decision. It is certainly wiser, if we are authorized by the Constitution to do so, to deal with the subject by statute rather than to be meeting it by constitutional amendments.

If, therefore, the machinery of the court can be geared to a higher plane and greater accuracy, thereby insuring its judgments greater support and approval, that should be our willing task.—*Extracts from article reprinted in Congressional Record, Feb. 19, 1922.*

Con

Frank W. Grinnell
Secretary of the Massachusetts Bar Association

THE proposal that no act of Congress should be declared unconstitutional unless seven, or two-thirds, or some other number greater than a majority, of the judges shall concur is not new either in Washington or Massachusetts. Does it occur to people that this undertakes to take the judicial power out of the hands of a majority and place it in the hands of a minority?

The whole subject was thoroughly debated in the Massachusetts Constitutional Convention of 1917. It was effectually disposed of by John W. McAnarney, with his characteristic force in debate, when in speaking of the plan to require concurrence of six out of seven of the Supreme Judicial Court of Massachusetts he said:

"Stripped of all verbiage this amendment proposes that a minority of two may prevent the Supreme Judicial Court from declaring a statute unconstitutional. If that be so, that in effect is giving a minority of two the power to declare a statute constitutional. That would be unique."

Further on he referred to the argument that decisions supported by a majority of four in a court of seven give the power to declare acts unconstitutional to one man. He said:

"It is not stating it correctly to say that it is a decision of one man that declares an act unconstitutional. It is not the decision of one man; it is the decision of one judge and three other judges. It is the decision of four men. . . ."

So in the Supreme Court of the United States, which consists of nine men, in the case of a decision by a majority of one, it is not one judge who decides; it is five judges.

Do citizens believe they would be better satisfied or that there would be less complaint and friction if Congress had authority to put into effect any law which it should choose when a majority of the Supreme Court, under the most pressing sense of responsibility that can be created by human beings, has declared its considered opinion that the act violates the Constitution? I do not believe that such a situation will appeal to the common sense of the American people.

The charge of usurpation of power by the courts in the decision of such questions is a mistaken one. It is not a question of power. It is a question of duty.

Many laymen, when they read of majority decisions of 5 to 4, probably wonder why it is that a court of nine judges cannot always agree on such questions, and whether law is getting too complicated for anybody to understand it. But they should remember that much of the complication in the law today arises not so much from the decisions of the courts as from the complex problems of modern life and the overwhelming multitude of statutes which are passed by Congress or by the State Legislatures.

People attribute too much importance to mere numbers, but in the history of a court and its administration of the law, the mere number of judges who agree is not the fact of outstanding importance. It is the relative soundness of the reasoning and judgment of the majority. During much of the time when the Supreme Judicial Court of Massachusetts made its great reputation throughout the country, when Chief Justice Shaw presided over it, the whole court consisted of five judges and during part of that time there were only four judges. The number of judges has increased as the amount of work has increased, but the importance of the questions decided is no greater today than it was then.—*Extracts from Boston Globe, Feb. 11, 1923.*

Proposal to Change "5-4" Decisions to "6-3" Discussed

Pro

Hon. Simeon D. Fess

U. S. Senator-elect, Republican, Ohio

OUR supreme concern should be to preserve the independence of the coordinate departments of the government, including that of the judiciary, which is the one differentiating feature of our system from all others. Most governments have a judicial department, but subject to the legislative, while ours is equal in independence of function to either the legislative or executive. The judicial is not equal in power as it has neither the power of the purse or the sword to enforce its decrees. The legislative is possessed of the former while the executive has the latter. But in the freedom of exercise of function to interpret the laws made by the legislative and enforced by the executive, it is equal to either. In the exercise of this right of independence the court in a series of decisions extending over more than a century and a quarter of duration has exerted the most profound influence in creating a stability in government unequalled in history.

The proposal of two-thirds vote of the Supreme Court to declare a law unconstitutional does not impinge in the slightest degree upon the one all important feature of independence of the court, and does not in the slightest degree violate the equal power of the coordinate departments, the very basis of the American system. On the other hand, it is in keeping with the ideas of the founders in creating and maintaining a system of balanced power. They provided that the legislative function in the executive to sign or veto a bill should not defeat the will of Congress unless unsupported by two-thirds of each House, hence an executive veto stands unless overridden by two-thirds of the legislative. They also provided that the executive could not be removed unless by an impeachment by two-thirds of the Senate. They also provided that the executive function to make treaties should not be defeated by the legislative unless it failed of ratification by two-thirds of the Senate. While Congress has the power to determine the number of members of which the Court shall be composed, it cannot reduce the number save by a refusal to provide for filling a vacancy. In other words, each department is in a way a check upon each of the other two, but when the action of the one directly affects the function of the other, it cannot and should not, generally speaking, do it by a mere majority vote, but as is provided in specific cases it requires two-thirds vote.

The Constitution should have included in these limitations a two-thirds vote of the Supreme Court to render null and void a law which must be enacted by two bodies of Congress and signed by the President or passed over his veto by two-thirds of each House. That would have been in strict conformation to the American principle of balanced power, and pursuant to other requirements when the principle of one department in the exercise of its function interferes with another coordinate department.

It is easy to see why this was not expressly provided for by the constitutional convention. The jurisdiction of the Supreme Court was broad. The original jurisdiction was fixed by the instrument, while the appellate would be quite unlimited. Cases involving the constitutionality of an act of Congress at the time appeared as a very small item in comparison with the work of the courts. In fact when the first case was later argued, the question was raised whether such a power was ever intended in the instrument, and strong contention was made against such power. However, it was

(Continued on page 282)

Con

Joseph D. Sullivan

Extract from Georgetown Law Journal, May, 1923

UNANIMITY of opinion does not always indicate a result above criticism. I prefer an opinion by a divided court. Then I feel sure that the case has been heard with attention, has been studied by the opposing groups of judges with a view to swaying the minds of those inclined to waver, and perhaps been the subject of an earnest argument in the council chamber. The clearest and best reasoned opinions are those written by judges who were aware that the opinion had to vindicate the position of the majority when read page by page upon the opinion of the minority. Minority holdings by judges and minority opinions are of great importance and they have their proper function in the machinery of jurisprudence, and part of that function is to key up and keep at the point of highest efficiency the majority judges. Judges don't dissent except in cases of doubt and difficulty. Must it not be true that there is more time, more attention, more study and more argument by the court in a case where there is a five to four opinion than in a case where all the judges think alike and there is a unanimous concurrence in the decision?

The chief ground of complaint of the five to four decision is that they are in the last analysis but the decision of one judge, but there would seem to be equal or more basis for this charge in the not unusual case of the opinion of one justice concurred in by the verbal acquiescence of other members of the court in council chamber. The virtue of the decision is not from any single justice but from the fact that it is the concurrent judgment of all who compose the majority of the court, and as the act of the majority it is the law.

One must have a strange idea of administrative justice to advocate that a majority opinion of the highest court of the land, the product of the highest trained judicial mind and the acme of judicial learning is not to be given effect, but that the minority opinion is to govern. The declaring of an act of the legislature, whether state or national, to be illegal because it is in conflict with the Federal Constitution is the result of an interpretation of the statute and an interpretation of the Constitution, and who are better fitted to perform this than the justices of this court? It is undoubtedly a judicial function and should be entrusted to the judges and no others. Certainly not to the legislature to interpret their own laws.

The minority opinion represents not what the law is but what some learned men think it should be. The majority decision is the law.

There is no reason why there should be a differentiation of the various classes of cases before the court and a variant requirement as to the number of judges who shall be able to declare the decision of the court in those cases. The minority of the court is still the minority, even though it seeks to maintain as valid an act of Congress. No special strength, no greater wisdom is given to the minority in such case. The law itself may have been passed by a single majority vote in either house of Congress.

What those who are advocating the curtailing of the powers of the Supreme Court in this regard really want can not be accomplished by a change in the number of justices who will constitute a majority of the court in a voiding decision, but can be by change in the personnel of the court. They are advocating through amendment of the Constitution of the United States what should be sought through change in the constitution of the court.

A change in the number of the court required to make a majority decision effective is undesirable.

State Governors Discuss Proposals to "Curb" Powers of Supreme Court

Pro

Hon. Alfred E. Smith

Governor, New York (Democrat)

IT would be well to place some limit on the power of the Supreme Court to nullify any law enacted by any legislative body, where the legislature declares in the act that the action taken is in the interest of public health or public welfare.

The real reason for the enactment of the minimum wage statutes is to promote public health, because it is just as cruel to underpay a woman as it is to overwork her. I get my idea from the opinion of Chief Justice Hiscock of the New York State Court of Appeals, in his opinion sustaining the law prohibiting women from working in the night-time in factories. In 1904 an identical statute was declared unconstitutional in that it abridged the liberty of the woman to contract. Ten years later, the same court in sustaining the same statute, practically said they did so because the legislature declared it to be in the interest of public health after an investigation that showed that night work was injurious to the health of women.

If laws such as the Minimum Wage Law, the Night Work Act, and the prohibition of women working in foundries are based upon the promotion of public health, and it is clearly set forth in the act that this is the legislative intent, it seems to me that it would be well that such a measure be set aside by a decision that would not leave in the minds of the people so much doubt as to the wisdom of the court's action.

Hon. Lee M. Russell

Governor, Mississippi (Democrat)

THEORETICALLY, I have always believed in keeping the three departments of government, legislative, executive and judicial, separate and distinct as proposed by the forefathers. However, in recent years the people generally are smarting under the seemingly arbitrary methods used by the Supreme Court of the United States and of the various States in nullifying the Acts of Congress and the Legislature.

In other words, the great masses of the people cannot understand when they have placed their wishes upon the statutes, and there can be no question that the statutes express their wishes, why any tribunal, court or otherwise, should set aside and hold for naught any law which is entirely satisfactory to them. In short, therefore, the Constitution will have to be made more flexible along this line or else the people are going to demand the powers of the court to be limited.

Hon. Ephraim F. Morgan

Governor, West Virginia (Republican)

WITHOUT going into the reasons for the conclusion I am unable to agree with those who advocate the proposition that there should be a change in our fundamental law limiting "the Supreme Court's power to nullify a law of Congress."

There is quite a tendency among certain classes to weaken the power of this great citadel of our liberties, the Supreme Court of the United States. I consider it the corner-stone of our boasted civilization and any attempt to lessen its power or influence should be frowned upon by all those who are interested in the perpetuity of this, the nearest approach to an ideal form of government known to civilization.

Con

Hon. Albert C. Ritchie

Governor, Maryland (Democrat)

PRESENT attempts to undermine the Supreme Court of the United States cannot be minimized. In part, they emanate from the United States Senate itself, and they have received impetus from recent decisions in the child labor and minimum wage cases. It is not necessary to discuss here whether those decisions justify constitutional amendments or not, because that is a question which does not at all affect the insidiousness of the movement against the court which rendered them.

It is not necessary to argue that the Supreme Court has made no mistakes. It is only necessary to say this: The Constitution guarantees free speech, free press, free religion, life, liberty and prosperity. Somebody must have the power to say whether a statute conforms to these guarantees.

Which shall it be: Congress or the courts? Have you such confidence in the judgment of Congress that you would make that body the final arbiter of your rights, or had you rather rely on the restraining hand of a Federal judiciary sworn to uphold the Constitution?

Both capital and labor should answer that question in the same way—capital, because the courts are the protectors of property; labor, because, paralyze the courts and the way is open for legislative oppression, and through all history oppression has always been on the side of wealth and power.—*Extracts from speech made before the Maryland Bankers' Association, Atlantic City, May 16, 1923.*

Hon. John C. Walton

Governor of Oklahoma (Democrat)

I REALIZE profoundly the danger to our free institutions in allowing any body so constituted, as the United States Supreme Court at times may be, to take action on many matters contravening the expressed will of the people through their representatives in Congress.

It would seem that there are some issues wherein are involved only matters of legal interpretation without political significance, in which a majority action of the Supreme Court could be final; but, on the other hand, where it has to do more with the expression of political penchant or individual adherence to one or the other schools of political philosophy then a clear majority should not prevail as against the express will of Congress.

Just how this limitation should be imposed upon the authority of the court I am not prepared at this time to say.

Hon. Joseph M. Dixon

Governor, Montana (Republican)

WHILE I have great respect for the integrity of purpose of the individual members of the Supreme Court, I am not impressed with the idea that they are either all wise or superhuman. Some of these decisions have undoubtedly been reached by applying fine-spun theories of constitutional interpretation with the result that the deliberate acts of Congress and the President have been nullified.

In reading the opinions of judges as to all of these mooted questions, you should always investigate the background and environment of the individual judge himself. Personally, I believe it would lead to a better condition of things if Senator Borah's suggestions could be adopted that no law could be nullified unless by at least a pronounced majority of the Supreme Court. The 7 to 2 basis would meet that condition. I also think the question should be solved by Senator La Follette's suggestion.

Citizens Discuss Proposals to "Curb" Powers of Supreme Court

Pro

Arthur S. Somers

President, Brooklyn Chamber of Commerce

WHILE the Brooklyn Chamber of Commerce has not taken any action in this matter, it is my personal opinion that Senator Fess's proposal, requiring a decision of the Supreme Court nullifying an act of Congress to be at least a 6 to 3 vote, is more fair and equitable than the other proposals which have been made.

I believe the interests of the people are safe when vested in the Supreme Court of the United States. At the same time, I think there ought to be a larger degree of unanimity among the judges of that court than is now expressed in a bare majority of one. For that reason I would prefer to see a two-thirds vote.

L. E. Sheppard

President, Order of Railway Conductors of America

WITH all due respect to members of the Supreme Court, be they ever so conscientious, they are but human and their judgment, therefore, not infallible, and, moreover, I am decidedly opposed to placing any man in office for life.

If two-thirds of the members of Congress differ with the Supreme Court, the members of that court, themselves, should be more than willing to acquiesce in the views of the representatives of the people. I do not advocate unanimous opinion by the Supreme Court because I recognize the fact that it would present an impossible situation in most instances. I believe it would be wise and for the best interests of all the people if the Supreme Court was less powerful.

Mrs. Lillian R. Sire

President, Women's National Democratic Club, New York

THE La Follette proposal meets my approval. Before an act of importance is passed its constitutionality is thoroughly discussed by qualified persons. Members of Congress themselves are intelligent men; the majority are lawyers, many of considerable attainments. They are sworn to defend the Constitution. If in spite of this they enact a law which seven or eight or nine Justices of the Supreme Court hold violative of the Constitution, doubtless their act should be nullified. But if as many as four of the nine Justices uphold the legality of their act after it has already been approved by the necessary number of Congressmen, reason suggests that the other five Justices are wrong. The second passage in Congress attests the serious consideration and deliberate decision of its members.

This is no more opposed to our tri-party Government than is the familiar executive veto of a legislative act.

Benjamin C. Marsh

Managing Director, Farmers' National Council

IN our judgment Representative Frear's proposal to require a decision by the United States Supreme Court overturning a law of Congress to be unanimous should be adopted, and that Congress should also be allowed to override such a decision of the Supreme Court by a two-thirds vote as Senator La Follette proposes. There is, of course, no danger of too rapid or unconsidered action by this combination, and there is no reason whatever why the people of the United States should not be allowed to decide what sort of legislation they want without interference by the Supreme Court.

Con

Russell Duane

President, Descendants of the Signers of the Declaration of Independence

I AM unalterably opposed to any modification of the existing right of the Supreme Court by a majority vote to declare unconstitutional any act of Congress or any law enacted by a State.

Such a change would undoubtedly be followed in the course of time by a proposal to abolish the right entirely, which would convert our system of Government into one resembling that of Great Britain, viz., a national legislature possessing absolute power and free from constitutional restrictions.

John W. Davis

President, American Bar Association, former Ambassador to Great Britain

I CAN only say that in my judgment any proposal which would weaken or destroy the power of the Supreme Court to pass upon the constitutionality of an alleged act of Congress should be resisted by all who genuinely believe in our form of constitutional government. Washington called the Federal judiciary the keystone of our political fabric, and such it has shown itself to be.

Whether a proposed statute does or does not conform to the Constitution may be a question primarily for Congress, but ultimately for the courts. To require more than a majority to decide this or any other question means simply to set up minority rule on the bench, since refusal by the court to declare a statute bad is equivalent to a decision pronouncing it valid.

John E. Edgerton

President, National Association of Manufacturers

THERE should be no change whatever with respect to the constitutional powers of the United States Supreme Court. Its clearly defined position of political independence is the Nation's chief safeguard against the distempered assaults of radicalism upon our fundamental liberties and institutions. To deprive the Court of the power of determining whether or not a temporary act of Congress is in accord with the supreme and permanent will of the people, as expressed in the Constitution, is to make Congress an omnipotent sovereign and take from the citizen any legal remedy by which he can protect his liberty or property from legislative invasion, a thing which has occurred many times in moments of political passion or prejudice.

At present, one judge may make a majority but under Senator Borah's proposal one judge can defeat a majority.

Charles Strauss

President, New York County Lawyers' Association

I DO not share the alarm of those who clamor about the threatened danger that the Judicial Department may usurp the powers of government, particularly when the court is divided five to four. In such a case it is argued that the decision is not the decision of the court but of a single judge. Of course this statement is unfounded, as even in that case the decision is of five judges. I look upon any effort to curb or control the power of the Supreme Court by legislation as nothing less than a rash experiment. It would be inconsistent with the very foundations upon which our Government rests, which wisely creates an absolute separation between the Judicial and the Legislative branches.

Notes on the Constitution

By Hon. Wm. Tyler Page

A series of twelve articles setting forth the fundamental principles of the United States Government as prescribed in the Constitution

Sixth Article—What the States May Do—Part 2

The House of Representatives shall be composed of Members chosen every second Year by the People of the several States, and the Electors in each State shall have the Qualifications requisite for Electors of the most numerous Branch of the State Legislature.—Article I, Section 2

This section provides two things, first, for a House of Representatives, one of the two branches of the Congress, to be chosen biennially *by the people of the several States;* and, second, that those who are entitled to vote for Members of the House of Representatives shall be those upon whom the States have conferred the right to vote for Members of the House of a State Legislature.

Election does not of itself constitute membership, although the period may have arrived at which the Congressional term commences. Neither does a return confer membership. Neither do election and return create membership. The House itself is the sole judge of the elections, returns, and qualifications of its own members. And therefore it has happened frequently that a person about whose election and return there is no question has not been permitted to take a seat in the House on his *prima facie* right, i. e., a certificate of election, the House adjudging him disqualified for some reason. Two prominent cases in recent years are those of Roberts (Utah), disqualified as a polygamist, and Berger (Wisconsin), excluded on the ground of giving aid and comfort to the enemy in time of war. Both of these men were elected and returned, but neither became members.

The time for which members shall be chosen is not defined, the Constitution being satisfied if the choice takes place at any time in every second year. The rest is left to the discretion of each State. But for the sake of uniformity and convenience the term of a Congress begins on the 4th of March of the odd numbered years and extends through two years. This results from the action of the Continental Congress on September 13, 1788, in declaring, on authority conferred by the Federal Convention, "the first Wednesday in March next" to be "the time for commencing proceedings under the Constitution." This date was the 4th of March, 1791. Congress, by law, has fixed the first Tuesday after the first Monday in November in the odd year as election day for Members of the House, and that day is observed with only one exception, the Members from the State of Maine, under a State law, being elected in September.

The States, in prescribing the qualifications of voters for the most numerous branch of their own legislatures, do not do this with reference to the election for Members of Congress. They define who are to vote for the popular branch of their own legislature, and the Constitution of the United States says the same persons shall have the right to vote for Members of Congress in that State. It adopts the qualification thus furnished as the qualification of its own electors for Members of Congress.

Delegates from Territories in the House of Representatives are not Members of the House, but are creatures of Statute, and the Congress may abolish the office altogether. Delegates are accorded certain privileges by the rules of the House, including participation in debate, but they are not allowed to vote. Resident Commissioners from the insular possessions have practically the same status as Delegates.

Representatives and direct Taxes shall be appointed among the several States which may be included within this Union, according to their respective Numbers, [which shall be determined by adding to the whole number of free Persons, including those bound to Service for a term of years, and] excluding Indians not taxed, [three fifths of all other Persons.]

The actual Enumeration shall be made within three Years after the first Meeting of the Congress of the United States, and within every subsequent Term of ten years, in such Manner as they shall by Law direct. The Number of Representatives shall not exceed one for every thirty Thousand, but each State shall have at Least one Representative; and until such enumeration shall be made the State of New Hampshire shall be entitled to choose three, Massachusetts eight, Rhode Island and Providence Plantations one, Connecticut five, New York six, New Jersey four, Pennsylvania eight, Delaware one, Maryland six, Virginia ten, North Carolina five, South Carolina five, and Georgia three.—Article I, Section 2, Clause 3 of the original Constitution.)

Those parts indicated in brackets, known as the old three-fifths rule, were abrogated by the 14th Amendment, Section 2, which is as follows:

"Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed." Before the adoption of this amendment, in determining the basis of representation, three white persons equaled five negroes (free and slave). Afterwards, all, white, and colored, were and are counted in the population as units.

The original clause under consideration was also modified in regard to direct taxes, by the 16th Amendmentt which now gives Congress" the power to lay and collect taxes on incomes, from whatever source derived, without apportionment among the several States, and withou, regard to any census or enumeration."

Each ten years there has been a readjustment of representation, except that no apportionment, based upon the decennial census of 1920 has yet been made. At present the membership of the House is 435 as provided by the apportionment of 1912, the basis of which for each Congressional District is 211,877. The membership of the First Congress, as fixed in the Constitution, was 65, from which it increased by decades to 242, based on the census of 1830. It then receded to 232 in 1840, since which time it has increased steadily.

While Congress by law apportions the number of Representatives to each State, the State legislatures establish the districts. The apportionment act provides that the districts in a State shall be equal to the number of Representatives, no one district electing more than one Representative. But the House has always seated members elected at large in the States, although the law has required election by districts. The districts are required to be composed of compact and contiguous territory (although some so-called "shoe-string" districts still exist), and containing as nearly as practicable an equal number of inhabitants. Many districts, as now formed, because of the increase of population and the failure to reapportion, contain in excess of 300,000 inhabitants.

The power to apportion representatives after an enumeration of population has been made, is nowhere to be found among the express powers given to Congress in the original Constitution, but the 4th Amendment includes an enforcement provision, prior to which Congress exercised that power "as irresistibly flowing from the duty positively enjoined by the Constitution."

Review of Attacks on U. S. Supreme Court Following Important Decisions—cont'd from page 271

nate circumstances attending this case aroused further bitter attacks upon the Court.

1897—In 1897, the Court, to the shock of the business world, for the first time announced, in *United States* v. *Trans-Missouri Freight Assoc.*, 166 U. S. 290, that railroad pools were illegal under the Sherman Act directed against combinations in restraint of interstate trade; eleven years later, when the case of *Loewe* v. *Lawlor*, 208 U. S. 274, was decided in 1908, the labor-unions were equally shocked to find that a labor boycott obstructing the free flow of commerce between the States came also within the prohibition of the Sherman Act.

1905—In the year 1905, the decision in *Lochner* v. *New York*, 198 U. S. 45, holding the New York bakers' ten-hour-law unconstitutional—one of the very few cases in which the Court has ever held invalid any State legislation designed to protect the laboring class for the welfare of society—aroused widespread public discussion, and evoked another series of attacks, such as had taken place, ten years previously, in 1896, over the Court's alleged exercise of an usurped power in passing upon the validity of statutes.

1908—In 1908, two cases in which Federal statutes were held invalid as beyond the power of Congress under the Commerce Clause produced some criticism of the Court—*The Employers' Liability Cases*, 207 U. S. 463, and *Adair* v. *United States*, 208 U. S. 161—the latter case involving the law prohibiting railroad discrimination against union labor. The decision that regulation of employment with reference to union conditions had no reasonable relation to interstate commerce caused much surprise and antagonism.

In 1908, in *Ex parte Young*, 209 U. S. 123, the Court decided that the Attorney-General of the State of Minnesota could be enjoined from bringing any proceedings to enforce against the Northern Pacific Railroad in the State Courts the State Railroad Rate Law, and could be fined for contempt if he disobeyed the injunction. The decision aroused harsh criticism throughout the country.

Extracts from "The Early History of the Supreme Court of the United States in Connection with Modern Attacks on the Judiciary" (1922), and "The Supreme Court in United States History" (1922), by Charles W. Warren. For tables of Cases see "The Supreme Court and Unconstitutional Legislation" (1913) by Blaine Free Moore.

(Hon. Robert M. LaFollette—cont'd from page 272)

ingly declare that they will no longer stand for all the wheels of progress being blocked by the arbitrary dictates of a majority of nine judges, but that a way shall be opened whereby the nation may move forward in peace, in order and in harmony to achieve the great ideals of freedom, prosperity and happiness enshrined in the Declaration of Independence and in the preamble of the Constitution of the United States.—*Extracts from address before Convention of American Federation of Labor, Cincinnati, Ohio, June 14, 1922.*

(Hon. George Sutherland—cont'd from page 272)

convenience. A departure of the line of legislation from the line of the Constitution, though inconsiderable at its inception, will become more and more extended as it proceeds, until some day we shall awake to the startled realization that the two have drawn so far apart that they can never again be reunited.—*Extract from speech before the American Bar Association, at Milwaukee, Wis., August 28, 1921.*

(Hon. Robert L. Owen—cont'd from page 273)

Constitution as contained in the Constitution, without modifying its meaning, without putting a strained interpreation upon it.

The country is in no danger from the Supreme Court or from any other court. The Constitution of the United States is all right. It was written all right. It only needs to be interpreted properly; it only needs to be exemplified and made to accomplish the ends for which it was intended.—*Extracts from speech in House of Representatives, Feb. 17, 1923.*

(Hon. John K. Shields—cont'd from page 273)

discharge this duty. The conflict of judicial opinion upon Federal questions, which would exist if the court did not have the right of review of cases involving them in the courts of last resort of the States, would also exist in each of the nine judicial circuits, and the confusion of the construction of Federal laws would be intolerable.—*Extracts from Article in New York Times, April 15, 1923.*

(Hon. Simeon D. Fess—cont'd from page 278)

made clear in the decisions of Justice Marshall that this was one of the chief functions of the court. It would have been a wise step to have provided originally that when the decision involved the setting aside of an act of a coordinate department upon the basis of violation of the constitution, that such important decision should not be allowed upon the narrow margin of one vote. It goes without saying if the constitution had fixed the number of associate justices instead of leaving it with Congress to determine so that it could have been known that the court would be composed of nine members, it would also have decided upon the two-thirds of the court as necessary to set aside an act of Congress.

I see no violation of the fundamental American system of independent coordinate powers in a requirement of two-thirds of the court to set aside a law of Congress. I do see as a most vicious violation the proposal of a review and reversal of the decision by two-thirds vote of Congress. That is in direct violation of our unique system and is an effort to abolish the American idea for the European idea.—*Extracts from a letter of April 11, 1923.*

(Hon. James A. Frear—cont'd from page 275)

sions of the court shall be practically unanimous or for recall of judges, or both, and it may be a salutary move to place a recall in the hands of two-thirds of Congress, thereby serving to keep the court fairly close to the will of the people.

Pursuant to the same ark of the covenant we can not well misread the following from section 2, Article III, that is couched in plain English:

"The Supreme Court shall have appellant jurisdiction both as to law and fact, with such exceptions and under such regulations as the Congress shall make."

No higher authority need be cited, and no greater responsibility rests on Congress today, in my humble judgment, than to do a plain duty under the Constitution.—*Extracts from speech in the House of Representatives, Jan. 27, 1923.*

(Hon. Harry B. Hawes—cont'd from page 275)

punishes or rewards upon impulse created by passion or prejudice.

It would destroy our sane plan of checks and balances.

It would disturb, unsettle, and make uncertain all the relations between men as individuals; it would make uncertain the relations between States; it would endanger the sanctity of contract; it would create for a period distrust and disputes which would destroy our national equilibrium and cause agricultural, labor, commercial, and industrial chaos.—*Extracts from Speech in the House Dec. 28, 1923.*

Recent Government Publications of General Interest

Agriculture

THE EFFECT OF BORAX ON THE GROWTH AND YIELDS OF CROPS; by J. J. Skinner and B. E. Brown. (Department of Agriculture Bulletin No. 1126.) *Price*, 15 cents.

Review of the literature, scope and plan of the investigation in 1920, effect of borax on cotton at Muscle Shoals, Ala., symptoms of borax-affected plants.

RASPBERRY CULTURE; by George M. Darrow. (Farmers Bulletin No. 887, reprint.) *Price*, 5 cents.

Covers types of raspberries, location of a plantation, planting, system of training and pruning, winter protection, harvesting, diseases and insects, varieties and uses.

Bandelier National Monument

IN THE LAND OF THE ANCIENT CLIFF DWELLER, Bandelier National Monument, Santa Fe National Forest, New Mexico. (Department of Agriculture, Miscellaneous Circular No. 5.) *Price*, 5 cents.

How to get to the Bandelier National Monument, accommodations, camping, what to see, what to read, where to get further information, with illustrations.

Coal

PREPARATION, TRANSPORTATION, AND COMBUSTION OF POWDERED COAL; by John Blizard. (Bureau of Mines Bulletin No. 217.) *Price*, 20 cents.

Uses of powdered coal, with appendix, index and illustrations.

Education

SUPERVISION OF ONE-TEACHER SCHOOLS; by Maud C. Newberry. (Bureau of Education Bulletin 1923, No. 9.) *Price*, 10 cents.

The need for adequate supervision of one-room schools, the attitude of the supervisor, solving the problem of organization, gaining the support of the local community, suggestions for the superintendent without assistants.

Fumigated Food Products

ABSORPTION AND RETENTION OF HYDROCYANIC ACID BY FUMIGATED FOOD PRODUCTS; by E. L. Griffin and others. (Department of Agriculture Bulletin No. 1149.) *Price*, 5 cents.

Purpose of investigation, experimental work, summary, and bibliography.

Game

MIGRATION RECORDS FROM WILD DUCKS AND OTHER BIRDS BANDED IN THE SALT LAKE VALLEY, UTAH; by Alexander Wetmore. (Department of Agriculture Bulletin No. 1145.) *Price*, 5 cents.

Covers migration and occurrence records, mallard, gadwall, cinnamon teal, shoveler, or spoonbill, pintail, redhead, other birds.

THE MUSKRAT AS A FUR BEARER WITH NOTES ON ITS USE AS FOOD; by David E. Lantz. (Farmers Bulletin No. 869, reprint.) *Price*, 5 cents.

General habits, injury to crops, injury to fish, the muskrat as food, muskrat farming, destroying the muskrats, enemies of the muskrat, protective laws.

Home Economics

HOME ECONOMICS EDUCATION; by Henrietta W. Calvin. (Education Bulletin 1923, No. 6.) *Price*, 5 cents.

Home economics in elementary schools, in high schools, food courses, clothing courses, home economics in foreign countries, etc.

Illumination

CODE OF LIGHTING FACTORIES, MILLS AND OTHER WORK PLACES. (Labor Statistics Bulletin No. 331.) *Price*, 10 cents.

Rules, suggestions and general information, advantages of good illumination, etc.

Kiln Drying

KILN DRYING HANDBOOK; by Rolf Thelen. (Department of Agriculture Bulletin No. 1136.) *Price*, 25 cents.

General principles of drying wood, heat in the kiln, kiln types, piling lumber for kiln drying, air seasoning.

Labor

THE SHARE OF WAGE-EARNING WOMEN IN FAMILY SUPPORT. (Women's Bureau Bulletin No. 30.) *Price*, 20 cents.

The family responsibilities of men and women wage-earners in Manchester, N. H., sources of family income, dependents, contributors, and family relationship, with bibliography.

Mica

MICA DEPOSITS OF THE UNITED STATES; by Douglas B. Sterrett. (Geological Survey Bulletin No. 740.) *Price*, 50 cents.

Geology, mineralogy, mica mining, description of mines, with index and illustrations.

Ore

TESTS OF LOW-GRADE AND COMPLEX ORES IN COLORADO; by Will H. Coghill and C. O. Anderson. (Bureau of Mines Technical Paper No. 283.) *Price*, 10 cents.

Mineral areas of Colorado, treatment of the ores, with tables and illustrations.

Petroleum and Allied Substances

PUBLICATION OF THE MONTHLY BIBLIOGRAPHY of petroleum and allied substances, which was discontinued several months ago, has been resumed by the Department of the Interior.

A limited edition of the bibliographies will be available for distribution. Applications to be placed upon the mailing list for the monthly bibliographies should be addressed to the Department of the Interior, Bureau of Mines, Customhouse, San Francisco, Calif.

Radio

A DECIMAL CLASSIFICATION OF RADIO SUBJECTS, an Extension of the Dewey System. *Price*, 10 cents.

Abbreviated classification of radio subjects, a complete table of class numbers, index to radio classification, etc.

DESCRIPTION AND OPERATION OF AN AUDIO-FREQUENCY AMPLIFIER UNIT FOR SIMPLE RADIO RECEIVING OUTFITS. (Bureau of Standards Circular No. 141.) *Price*, 10 cents.

Essential parts of complete radio receiving station, description of parts, assembly and wiring, connections, operations, suggestions to students.

DIRECTIVE RADIO TRANSMISSION ON A WAVE LENGTH OF 10 METERS; by Francis W. Dunmore and Francis H. Engel. (Bureau of Standards Scientific Paper No. 469.) *Price*, 10 cents.

The generating circuit, reflecting system, receiving apparatus, results.

Rats

HOW TO GET RID OF RATS; by James Silver. (Farmers Bulletin No. 1302.) *Price*, 5 cents.

Eliminating food and shelter, poisoning, trapping, fumigants and deterrents, rat proofing, natural enemies of the rats, community cooperation, with summary.

Shellac

SHELLAC; by Percy H. Walker and Lawrence L. Steele. (Bureau of Standards Technologic Paper 232.) *Price*, 5 cents.

Source, preparation and use of shellac, the methods of testing shellac, material insoluble in alcohol, suggested specifications for pure orange shellac, etc.

Spontaneous Combustion

FIRES IN STEAMSHIP BUNKER AND CARGO COAL; by H. H. Stoek. (Bureau of Mines Technical Paper No. 326.) *Price*, 10 cents.

Data on ship fires, recent fires in bunker or cargo coal, explosion on steamship Adriatic, reports on fires, spontaneous combustion, heating of coal, etc.

Talc and Soapstone

TALC AND SOAPSTONE, THEIR MINING, MILLING, PRODUCTS AND USES; by Raymond B. Ladee. (Bureau of Mines Bulletin No. 213.) *Price*, 25 cents.

Mineralogy and characteristics, origin and geological occurrence, geological distribution, prospecting and development, quarrying and milling of slab soapstone, etc.

Statistics

METHODS OF PROCURING AND COMPUTING STATISTICAL INFORMATION of the Bureau of Labor Statistics. (Labor Statistics Bulletin No. 326.) *Price*, 10 cents.

Wages and hours of labor, changes in the cost of living, retail prices, wholesale prices, volume of employment, strikes and lockouts, industrial accidents, labor laws and decisions.

Steel Car Wheels

THERMAL STRESSES IN STEEL CAR WHEELS; by George K. Burgess and G. Willard Quick. (Bureau of Standards Technologic Paper No. 235.) *Price*, 15 cents.

Vital Statistics

REPORT ON NATIONAL VITALITY, ITS WASTES AND CONSERVATION; by Professor Irving Fisher. (Bulletin No. 30, of the Committee of One Hundred on National Health.) *Price*, 10 cents.

Length of life versus mortality, the breadth of life versus invalidity, methods of conserving life, with appendix and index.

Notes on Foreign Governments

By ANNIE M. HANNAY, M. A., University of Glasgow

Additional detailed information in regard to foreign governments may be procured through the CONGRESSIONAL DIGEST Information Service for a nominal charge.

Questions and answers will be published from time to time in this Department. Address your inquiries to Foreign Department, CONGRESSIONAL DIGEST, Munsey Bldg., Washington, D. C.—*Editor's Note.*

British Secretary of State for Foreign Affairs Reviews Ruhr Situation

Digest of Official Text of Speech by the Marquis Curzon of Kedleston (Secretary of State for Foreign Affairs) in the House of Lords, April 20, 1923

LORD CURZON proposed to give a general survey of the situation; to explain the policy of His Majesty's Government, and to state how far they had been justified in pressing it up to the present day, in what way it had already affected or might affect the relations of Britain with her allies and with other European Powers; whether the Government proposed to continue the policy; and whether there were any recent developments that caused them to change their view.

The situation in its present form started from the request of Germany in July, 1922, for the extension of the moratorium over the years 1922, 1923 and 1924, and from the refusal of the French in August last to grant that moratorium except in return for productive pledges. Different plans were put forward by different parties. Finally at the Paris Conference of January last, a series of proposals were made by the British, French and Italian Governments. The British Government pressed for the reduction of the reparations debt to 2,500,000,000 pounds in gold. It pressed for the immediate issue of bonds of that amount, for the issue of a further amount of bonds equivalent to 865,000,000 pounds in gold, to be issued subject to the decision of an Arbitral Tribunal in 1923, and representing the amount of the interest deferred on the 2,500,000,000 pounds during the moratorium period. The British Government further urged the granting of a four-year moratorium, subject to the establishment in Berlin of a foreign Financial Council to supervise the reorganization of German finance. Should Germany fail to satisfy this Council that she was making adequate efforts at financial reorganization, the British Government made it clear that they were ready to take part with their Allies in the forcible seizure of German revenues and assets and the extension of the occupation. This point had been largely forgotten in the subsequent discussions. The British Government was ready, subject to the acceptance of the foregoing scheme, to cancel the French and Italian war debts, after various minor financial adjustments had been made.

These proposals were refused by the French Government, supported by the Belgian and Italian Governments, who made it plain that they would consent to no reduction of the French share of the German reparation debt, save as a set-off against the cancellation of the French war debt to Great Britain, and that they would consent to the granting of no additional moratorium to Germany without the surrender of "productive pledges."

The Prime Minister stated his inability to accept the French proposals, because the British Government believed that if they were carried into effect, they would be likely to have a grave and even disastrous effect upon the economic situation in Europe. At the same time he assured the French Government that the feeling of friendship not only on the part of the British Government but of the British people towards the Government and people of France remained unchanged.

The British Government instructed its representatives on the Rhineland and Reparations Commissions to refrain from participating in any decisions arising directly out of French and Belgian action, and to refuse responsibility for them. It refrained from taking sides in the controversies between the French and the Germans, and used its influence at every stage to bring about peaceful arrangements.

The British Government had adopted a simple attitude of friendly detachment towards the various suggestions for intervention that had been made from time to time, feeling that, until France and Germany could come together, outside intereference would be of little avail, and that, by stepping in prematurely, Britain might do more harm than good. Her guiding consideration throughout had been that the Entente between France and Britain and their Allies should not be broken. It was her conviction that the Entente was the basis of European recovery and of European peace.

THE FRENCH POINT OF VIEW

The French and Belgian Ministers had made four declarations since the occupation was begun. On March 12, they formally announced that their intentions remained as outlined during the Paris Conference, that they were agreed not to subordinate the evacuation of the Ruhr and the newly-occupied territories to mere promises made by Germany, but to effect the evacuation progressively as Germany executed her reparation obligations. This announcement was followed by a yet more explicit statement by M. Poincaré on March 27, that the evacuation of Essen would only be considered as a final step after a complete settlement of reparations. Later, after a conference at Paris between the Belgian minister and the French Government, a communiqué was published stating that the Belgian and French Governments had formulated a whole series of new measures to accentuate their pressure in the Ruhr and to continue it as long as might be necessary. Finally, M. Poincaré repeated the same declaration on April 15. The French attitude was one of fixed and inflexible determination, and any intervention on the part of Britain would have been both unwise and fruitless.

THE GERMAN POINT OF VIEW

Germany had shown a capacity for resistance which had surprised both her opponents and her friends. The position had been very difficult for her. There had been a serious shortage in her stocks of raw material. There had been a gradual rise in the cost of production and a consequent inability to carry out her exports. Above all, there had been amazing fluctuations in the exchange value of the mark. Nevertheless, the utmost that the German Government had so far been prepared to do had been to revive the suggestion due to the American Secretary of State, that her capacity to pay should be referred to an international committee of business men or experts. That suggestion was immediately declined by France. The general sentiment in the Reichstag was one of approval of the Government policy hitherto pursued with regard to the Ruhr, a complete unity of opinion in favor of the continuance of passive resistance. With regard

British Secretary of State for Foreign Affairs Reviews Ruhr Situation—*cont'd*

to the Rhineland, they had declined to consider any proposal that would lay a territorial or a political hand on that region.

On the one hand was a State with a profound and legitimate sense of injury, convinced that she had been duped and defrauded by a beaten foe, and that her national existence might one day again be exposed to unprovoked attack. On the other hand was a State equally convinced that advantage was being taken and would continue to be taken of her weakness and exhaustion to reduce her to a state of permanent servitude, and to deprive her of her main productive resources. How could an exit be found from this apparent cul de sac?

THE BRITISH POLICY SUMMARIZED

The policy of the British Government was based on the Entente as the one solid and stable factor in a world of flux. Only on that foundation was there any likelihood of building a new and stable structure, either in the Ruhr or at Lausanne. Consistently with that policy, the British Government had observed and would continue to observe an attitude of watchful and friendly neutrality.

Britain had not receded from the proposals put forward by the Prime Minister in January. But the Government was prepared to resume discussion on that point, and also to discuss plans or proposals with regard to securities, so long as they did not involve the dismemberment of Germany or the setting up of a new and running sore in the heart of Europe. If guarantees were to be given, they should be guarantees that were reciprocal in nature. With regard to reparations, Britain had not abandoned and would not abandon her own claims. As regards foreign debts, she had already made a very generous offer. The problem was an international one which could only be decided by common action and not by isolated agreement between any two Powers or any small group of Powers.

Europe's Official Communications on the Ruhr Situation

German Note on Reparations to the Allied Governments, May 2, 1923

THE German Government declared at the outset that it would continue its policy of passive resistance in the Ruhr, the definite abandonment of which M. Poincaré made a condition of negotiations. Germany made the following offer:

1. That the total payments made by Germany to the Allied Governments should be 30,000,000,000 gold marks, to be raised by the issue of loans on the international money markets, in instalments of—

20,000,000,000 marks up to July 1, 1927.
5,000,000,000 marks up to July 1, 1929.
5,000,000,000 marks up to July 1, 1931.

2. That, should the latter sums not be fully raised within the proposed time-limits, an International Commission, such as had been suggested by Mr. Hughes, should decide "whether, when and how the rest should be raised."

3. That the German Government would provide special guarantees for the proposed payment, secured by legislation.

The note went on to state that the carrying out of these obligations depended upon the stabilization of the mark, and the doing away with the stipulations of the Treaty of Versailles refusing economic equality to Germany.

The German Government was willing to conclude with France a Rhine pact, and also any agreement to ensure peace based on reciprocity.

In conclusion, the note demanded the restoration of the status quo ante in the Ruhr and the Rhineland "within the shortest space of time."

Franco-Belgian Reply to German Note of May 2, Presented May 6, 1923

THE French and Belgian Governments took exception at the outset to a number of observations made by the German Government. It was not true that any measures had been taken by the French and Belgians that were not in accordance with the Treaty of Versailles. On the other hand, Germany had violated the conditions of the treaty in many respects. As a result, Belgium and France took pledges, but without violence, and, had the German Government not stood in the way, collaboration would have been established in the Ruhr between the German and the Allied industrialists, engineers and workmen. It was the German Government and not the German people that organized the resistance in the Ruhr, as it implicitly admitted, by declaring that that resistance would only cease after an agreement had been made. Furthermore, that resistance was not only passive but active, and as such was in direct violation of the Treaty of Versailles. The French and Belgian Governments would not entertain any German proposal as long as that resistance continued.

The proposals made by Germany were absolutely unacceptable. The figures submitted were entirely inadequate. France had expended 100,000,000,000 francs on Germany's account. Belgium had advanced 15,000,000,000 Belgian francs. Each country still had more than half of its damages to repair, apart from the question of pensions. To leave France aside, the sum offered would not enable Belgium to restore her devastated regions.

The offer of 30 milliards, besides, contained a certain measure of elasticity which was fraught with danger. It would be possible for Germany to bring it into discussion before it became a reality.

When the London schedule of payments was established, the Allied Governments postponed the payment of nearly two-thirds of the German debt to an indefinite period, to be determined solely by the state of Germany's prosperity. The German Government had not ceased to protest against this ruling. Yet it proposed to reduce by over three-fifths the fixed portion of the debt, and by over seven-eighths the indeterminate portion, while retaining the indetermination.

As a matter of fact, Germany was claiming a complete moratorium until July, 1927. The sum of 20 milliards was, moreover, considerably reduced inasmuch as from July 1, 1927, the interest must be subtracted from the yield of the loan. In calculating the rate of discount at 6%, the value of the 20 milliard marks would be reduced to 15,820,000,000 francs. The German Government did not guarantee that even that sum would be actually paid on the date indicated, and it offered still less guarantee for the two supplementary sums of 5 milliards to be paid in 1929 and 1931 respectively.

Europe's Official Communications on the Ruhr Situation—*cont'd*

The French and Belgian Governments had already set aside the suggestion made at the Paris Conference to replace the Reparations Commission by an International Commission composed of committees of business men and courts of arbitration.

The German Government, in spite of many suggestions from the Reparations Commission, had not yet indicated either by what means it would seek to stabilize its currency or what legislative measures it would take or what resources it would draw upon to guarantee the different loan issues.

Equally vague and illusory were the indications given by the German Government regarding the security guarantees which it said it was ready to offer France. Belgium was not even mentioned.

The Belgian and French Governments had always been favorable to international pacific procedure. The Treaty of Versailles was itself an entente to guarantee peace based on reciprocity, and yet the German Government paid no attention to the principal clauses it contained.

The Belgian and French Governments had decided that they would only evacuate the occupied territories as payments were effected. They would not change that resolution.

The German note was nothing but the veiled expression of a systematic revolt against the Treaty of Versailles.

The German Government must review its own proceedings, and then it would not be astonished that the bargain offered had been refused.

British Reply to German Note of May 2, Presented May 13, 1923

THE British Government was particularly interested in the German note as it was well-known to be the sequel of a suggestion made by Lord Curzon in the House of Lords on April 20.

The proposals made by Germany had come as a great disappointment to His Majesty's Government for the following reasons:

1. The German Government offered, in total payment of their acknowledged debt, a sum which fell far below the moderate amount proposed by Great Britain at the Paris Conference of January last. Furthermore, the payment of even that inadequate sum was made dependent upon the issue of a series of international loans, the success of which, in the conditions predicated, must be largely speculative. The scheme proposed actually contained provisions dealing with the contingency of the loans not materializing, and the arrangements proposed in this connection involved financial conditions less burdensome to Germany than if the loans were to be successful, so that there was no real incentive to raise them.

2. The vague assurances and references to future negotiations with regard to the guarantees which Germany was prepared to offer were lacking in practical value. If Germany intended, as His Majesty's Government would like to believe, to open the way to an effectual and speedy solution of a problem, the failure to settle which was gravely disturbing the political and economic condition of Europe and of the whole world, it was unfortunate that she should not have shown a keener appreciation of the lines on which alone any such settlement could be sought.

The British Government was persuaded that in her own interest Germany would reconsider and expand her proposals, so as to convert them into a feasible basis for further discussion. The German Government must realize that a contribution much more serious and much more precise was required than any which had yet been forthcoming.

Italian Reply to German Note of May 2, Presented May 13, 1923

A CAREFUL examination of the German memorandum of May 2, had convinced the Italian Government that the proposals it contained were not of a character to serve as a basis for definitive discussion by the Allied Governments.

Italy, owing to her economic and financial position, was obliged to regard the problems of reparations and Inter-Allied debts as most closely connected, and to demand that they be solved at the earliest possible moment, in view of the expenditure entailed in the reconstruction of her invaded provinces.

Italy was prepared to bear her share of the sacrifices necessary to bring about a general economic settlement, but she could not consent to have other sacrifices forced upon her which she could not reasonably bear.

The German Government was aware that the Italian Government had been obliged, to its regret, to refrain from accepting the proposal for the settlement of reparations presented by the British Government at the Paris Conference. And yet the German note of May 2 contained an offer much inferior to the demand of the British Government on that occasion.

Apart from the fact that the sum fixed for reparations was much lower than could reasonably be expected, the international loan by which the payment of the sum would be made was only indicated in general terms. No definite statement was made regarding guarantees and pledges.

The Italian Government, therefore, hoped that, in the interests of Germany and in the interests of European economy, a new decision by the German Government would shortly result in proposals which would form a useful basis of discussion for Italy and her Allies.

The British-Russian Communications

British Note to the Soviet Government, May 8, 1923

IN its note to the Soviet Government, the British Government reminded the former that two years previously a Trade Agreement had been concluded between the two countries with a view to promoting commercial relations between them, the question of political relations being postponed until that agreement had been tested in practice, and until the Soviet Government had satisfied certain indispensable conditions. The British Government had thus signified its willingness to establish a friendly understanding with the Russian Government and the Russian people, and had also

The British-Russian Communications—*cont'd*

made a material contribution to the stability and prosperity of the Russian State. At the same time the stipulation had been made that both parties should refrain from hostile action or propaganda, the one against the other. That undertaking scrupulously observed by the British Government, had been consistently and flagrantly violated by the Soviet Government. The British Government protested against such violation, giving examples of anti-British intrigue carried on in Persia, Afghanistan, India, etc., with the assistance of the Soviet authorities.

Unless such actions were repudiated and apologized for, and unless the officials responsible for them were disowned and recalled, it was manifestly impossible to persevere with an agreement so one-sided in its operation.

Apologies and compensation were also requested for outrages inflicted on British subjects, the most conspicuous cases being the murder of Mr. C. F. Davison and the imprisonment of Mrs. Stan Harding, and for a series of acts interfering with British shipping in contravention of the generally accepted conventions of international law.

Attention was drawn to the insulting and offensive character of the reply made to the British representative at Moscow when he made an earnest appeal to the Russian Government for a stay of execution in the case of Mgr. Butkevitch. This note was at once returned. Later a second note was received couched in terms even more offensive. The British Government requested the unequivocal withdrawal of these two communications.

Unless within ten days of the receipt of the above communication by the Commissariat for Foreign Affairs the Soviet Government had undertaken to comply fully and unconditionally with the requests it contained, the British Government would recognize that the Soviet Government did not wish the existing relations between them to be maintained, and would consider themselves free from the obligations of the Trade Agreement.

Reply of Soviet Government to British Note

THE reply of the Soviet Government was handed to the British Official Agent in Moscow on May 12. It protested against the bitter and unfounded hostility of the British Government's memorandum. The method of ultimatums and threats was not one by which satisfactory relations with the Soviet Republics could be achieved.

The Soviet Government, while appreciating the fact that Great Britain had been first of all the great Powers to conclude an agreement with it, realized that both political and economic advantages were derived by Great Britain as well as by Russia, and that the establishment of peaceful relations with the Soviet Republics was a necessary condition for peace and for the restoration of the economic welfare of all the European countries. The unsatisfactory basis of the agreement had been selected by Britain herself.

The Soviet Government denied having thrown down any challenges to Great Britain since the conclusion of the agreement, but accused the British Government of lack of consideration for the interests of the Soviet Republics in connection with various international problems, such as the questions of the Straits, of Eastern Galicia, of Memel, etc.

The Russian Government had a large number of reports and documents demonstrating the extremely energetic activity of British Government agents to the detriment of the interests of the Soviet Republics in Central Asia. But it did not consider it possible to base protests on agents' reports and intercepted documents.

The extracts and quotations cited by the British Government were a combination of invented, falsified, altered and arbitrarily supplemented extracts from deciphered telegrams.

The Russian Government never undertook to always support the policy of the British Government in the East, and it could not admit that the maintenance and development of amicable connections with the peoples of the East, founded on a genuine respect for their interests, was a breach of the Russo-British Trade Agreement. The British Government had always refused a friendly discussion of means of eliminating such misunderstandings. Even at Lausanne Lord Curzon limited himself to a repetition of general reproaches, refusing to explain or to discuss them.

The Soviet Government had repeatedly declared that it could in no way be identified with the Third International.

The British memorandum had not quoted a single fact to prove infringement of the interests of British citizens since the signing of the Russo-British Trade Agreement. The cases of Mr. Davison and of Mrs. Stan Harding dated back to 1920. And explanations had already been made by the Russian Government in a protracted correspondence. There were cases of a number of Russian citizens having suffered imprisonment and bodily harm within the sphere of the British authorities during the same period. The Russian Government would compensate the families of Mr. Davison and of Mrs. Stan Harding if the British Government would express the same readiness in regard to the above-mentioned Russian citizens.

The Russian Government had already pointed out the absence of universally binding international regulations with regard to territorial waters. But steps had been taken to free the trawlers that had been arrested.

The Russian Government denied that it had persecuted any religion whatsoever. Soviet justice only punished ecclesiastics who abused their position to enter upon political activities against the safety of the Soviet Republics. The Soviet Government was willing to recognize the unusual tone of the note sent on the subject, but it had been written at a time of great national excitement and indignation. It had been returned by the British representative, and had not been dispatched a second time. Therefore it could be considered as non-existent.

While not denying the fact that a considerable number of countries had of recent years fallen into a dependent or semi-dependent position in respect of the countries of the former Entente, the Russian Government declared that the position of the Soviet Republics was not, could not and would not be dependent upon the will of a foreign government. If the British Government would take cognizance of that fact, the most important obstacle to the establishment of normal and tranquil relations, equally beneficial for both countries, would be eliminated.

In spite of misunderstandings the Soviet Government placed a high value on the present relations with Great Britain, and sought to maintain and develop them in the interests of universal peace. It declared that there was no foundation for a rupture of relations, and that the majority of questions at issue could be settled by a conference of competent representatives of both sides without great difficulty.

The Soviet Government therefore proposed to the British Government to accept the method of a conference, and to agree upon a place and time at which authoritative representatives of both sides could regulate to the fullest extent the relations between the Soviet Government and Great Britain.

—NEXT MONTH—

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